

AGENDA — May 2, 2000 Business Taxes Committee Meeting
Proposed Revisions to Audit Manual Chapter 10, Occasional Sales - Sale of a Business

<p>Action 1 — Consent Item</p> <p>Proposed revision to Audit Manual Chapter 10, <i>Occasional Sales – Sale of a Business</i>.</p>	<p>Adopt proposed revisions as agreed upon by industry and staff.</p>
<p>Action 2 —Definition of the Types of Sales That Qualify a Seller as Making More Than Two Sales in a 12-Month Period (AM Section 1001.30)</p>	<p>Adopt either:</p> <p>1) Staff’s recommendation to make no changes to the types of sales excluded from a determination of whether a person has made more than two sales in a 12 month period,</p> <p>or</p> <p>2) Interested party’s proposal to amend AM section 1001.30 to add to the types of sales excluded from a determination of whether a person has made more than two sales in a 12 month period those transactions that are excluded from the definition of “sale” and those that are exempt from tax under the Sales and Use Tax Law.</p>
<p>Action 3 —Determination of Whether All Sales Qualifying as Taxable in Each 12-Month Period Are Subject to Tax (AM Section 1001.35)</p>	<p>Adopt either:</p> <p>1) Staff’s recommendation to make no changes to the current interpretation that all sales are subject to tax when a person makes more than two sales for substantial amounts in a period of 12 months,</p> <p>or</p> <p>2) Interested party’s proposal to amend AM section 1001.35 to make sales subject to tax beginning with the third substantial, nonexempt sale in any 12-month period.</p>
<p>Action 4 — Authorization to Publish</p> <p>(whichever language is approved)</p>	<p>Direct the publication of the proposed revisions to Audit Manual Chapter 10 as adopted in the above actions.</p>
	<p>Operative Date: None</p> <p>Implementation: Upon Board approval</p>

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Action Item	Staff and Industry’s Proposed Regulatory Language
Action 1 — Consent Item(s) Proposed revisions to Audit Manual Chapter 10, <i>Occasional Sales – Sale of a Business</i>	Refer to Exhibit 2 for revised text.

AGENDA — May 2, 2000 Business Taxes Committee Meeting
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Action Item	Language Proposed by Staff	Language Proposed by Interested Party	Comments
Action 2 -Definition of the Types of Sales That Qualify a Seller as Making More Than Two Sales in a 12 Month Period (AM Section 1001.30)	<p>DETERMINATION OF NUMBER OF SALES 1001.30</p> <p><u>More than two sales of tangible personal property for substantial amounts during any 12-month period (not calendar year) requires the holding of a seller's permit. In determining whether a person has made three or more than two sales during a 12-month period, the following types of sales are to be excluded:</u></p> <ul style="list-style-type: none"> a) Trade-ins made incidental to a nonselling activity. <u>For example, an accountant trading in an old copier for a new one.</u> b) Sales made by an auctioneer on behalf of the <u>person subject(auctioneer is the retailer and liable for the tax).</u> c) Sales of horses through claiming races (racing association is <u>the retailer seller</u> and liable for the tax). d) Sales of vehicles, vessels or aircraft, the sale of which is exempted from the sales tax by <u>Law Sections 6282 and 6283, but subject to use tax imposed on the purchaser.</u> 	<p>DETERMINATION OF NUMBER OF SALES 1001.30</p> <p><u>More than two sales of tangible personal property for substantial amounts during any 12-month period (not calendar year) requires the holding of a seller's permit. In determining whether a person has made three or more than two sales during a 12-month period, the following types of sales are to be excluded:</u></p> <ul style="list-style-type: none"> a. Trade-ins made incidental to a nonselling activity. <u>For example, an accountant trading in an old copier for a new one.</u> b. Sales made by an auctioneer on behalf of the <u>person subject(auctioneer is the retailer and liable for the tax).</u> c. Sales of horses through claiming races (racing association is <u>the retailer seller</u> and liable for the tax). d. Sales of vehicles, vessels or aircraft, the sale of which is exempted from the sales tax by <u>Law Sections 6282 and 6283, but subject to use tax imposed on the purchaser.</u> <u>e. Sales that are excluded from the definition of “sale” or are otherwise exempt from tax under the Sales and Use Tax Law.</u> 	<p>Staff is of the opinion that the existing sales and use tax law broadly defines what constitutes a “sale” for the purpose of determining when sellers need to register with the Board. RTC section 6014 includes sales of all tangible personal property the gross receipts from which are required to be included in the measure of tax if sold at retail, whether or not the property is actually sold or is suitable for sale at retail. Consequently, if a person makes an exempt sale, the sale is still factored into the determination of whether the seller needs to register for a permit. Staff believes the change recommended by the interested party needs legislative action.</p>

AGENDA — May 2, 2000 Business Taxes Committee Meeting
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Action Item	Language Proposed by Staff	Language Proposed by Interested Party	Comments
	<p>Persons Anyone engaged in a business which does not require the holding of a seller's permit is <u>are</u> not liable for sales tax measured by the <u>gross</u> receipts from a retail sale of a <u>piece of</u> equipment used in the conduct of the business, even though he or she may have made a series of trade-ins of old <u>for new</u> equipment for new, incidental to the business.</p> <p>The sale of the equipment in question is not regarded as one of a series of sales, or the equipment as having been used in a selling activity and thus, the sale is an occasional sale.</p> <p>If, however, in addition to the sale in question, two or more sales of substantial amounts have been made or are made in a period of 12 months, the sale is taxable regardless of whether even though the other sales were <u>at retail, sales for resale, or exempt from tax (for example, a sale in interstate commerce), all of the non exempt sales at retail are subject to tax.</u></p>	<p>Persons Anyone engaged in a business which does not require the holding of a seller's permit is <u>are</u> not liable for sales tax measured by the <u>gross</u> receipts from a retail sale of a <u>piece of</u> equipment used in the conduct of the business, even though he or she may have made a series of trade-ins of old <u>for new</u> equipment for new, incidental to the business.</p> <p>The sale of the equipment in question is not regarded as one of a series of sales, or the equipment as having been used in a selling activity and thus, the sale is an occasional sale.</p> <p>If, however, in addition to the sale in question, two or more qualifying sales of substantial amounts have been made or are made in a period of 12 months, <u>the seller must obtain a seller's permit.</u> the sale is taxable regardless of whether even though the other sales were <u>at retail, sales for resale, or exempt from tax (for example, a sale in interstate commerce), all of the non exempt sales at retail are subject to tax.</u></p>	

AGENDA — May 2, 2000 Business Taxes Committee Meeting
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Action Item	Language Proposed by Staff	Language Proposed by Interested Party	Comments
Action 3 —Determination of Whether All Sales Qualifying as Taxable in Each 12-Month Period Are Subject to Tax (AM Section 1001.35)	<p>MUST QUALIFY IN EACH 12-MONTH PERIOD 1001.35</p> <p>If a seller qualifies as a retailer in one 12-month period, he <u>or she</u> must also qualify in subsequent 12-month periods if <u>the Board is we are</u> to assert the tax on sales made during subsequent periods. <u>When more than two sales are made in any 12 month period, all sales during that period are subject to tax.</u> For example:</p> <p>An examination <u>of sales</u> of an occasional <u>unpermitted</u> seller or <u>property not held or used in the course of activities requiring a seller's permit reveals</u> sales as follows:</p> <p>a) January 3, 199680 <u>Non Taxable</u> NT</p> <p>b) August 16, 199680 <u>Non Taxable</u> NT</p> <p>c) September 8, 199784 <u>Taxable</u> T</p> <p>d) March 8, 199882 <u>Taxable</u> T</p> <p>e) July 17, 199882 <u>Taxable</u> T</p> <p>f) November 10, 199882 <u>Taxable</u> T</p> <p>g) August 11, 199983 <u>Non Taxable</u> NT</p> <p>h) December 12, 199983 <u>Taxable</u> T</p> <p>i) September 8, 20001984 <u>Taxable</u> T</p>	<p>MUST QUALIFY IN EACH 12-MONTH PERIOD 1001.35</p> <p>If a seller qualifies as a retailer in one 12-month period, he <u>or she</u> must also qualify in subsequent 12-month periods if <u>the Board is we are</u> to assert the tax on sales made during subsequent periods. <u>When more than two sales are made in any 12 month period, all sales during that period are subject to tax.</u> For example:</p> <p>An examination <u>of sales</u> of an occasional <u>unpermitted</u> seller or <u>property not held or used in the course of activities requiring a seller's permit reveals</u> sales as follows:</p> <p>a) January 3, 199680 <u>Non Taxable</u> NT</p> <p>b) August 16, 199680 <u>Non Taxable</u> NT</p> <p>c) September 8, 199784 <u>Non Taxable</u> T</p> <p>d) March 8, 199882 <u>Non Taxable</u> T</p> <p>e) July 17, 199882 <u>Taxable</u> T</p> <p>f) November 10, 199882 <u>Taxable</u> T</p> <p>g) August 11, 199983 <u>Non Taxable</u> NT</p> <p>h) December 12, 199983 <u>Non Taxable</u> T</p> <p>i) September 8, 20001984 <u>Non Taxable</u> T</p>	<p>Staff is of the opinion that section 6006.5 states that an occasional sale can occur only if it is not one of a series of sales and that Regulation 1595(a)(4) clearly states that gross receipts from all sales are subject to tax if the seller is required to hold a seller's permit. Exclusion from tax for any sales occurring during a requisite 12 month period requires a regulatory change.</p>

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Action Item	Language Proposed by Staff	Language Proposed by Interested Party	Comments
	<p>j) December 9, 20001984 Taxable ±</p> <p>Sales (a) and (b) are nontaxable as they were the only ones made between January 3, 199680 and September 8, 199781.</p> <p>Sales (c), (d) and (e) are taxable as they were made within a 12-month period between September 8, 199781 and July 17, 199882.</p> <p>Sale (f) is taxable as it was made during the same 12-month period sales (d) and (e) were made.</p> <p>Sale (g) is not taxable as it was the only sale made between November 10, 199882 and December 12, 199983.</p> <p>Sales (h), (i) and (j) are taxable as they were made in a 12-month period ending December 9, 20001984.</p>	<p>j) December 9, 20001984 Taxable ±</p> <p>Sales (a) and (b) are nontaxable as they were the only ones made between January 3, 199680 and September 8, 199781.</p> <p>Sales (c), and (d) are nontaxable, and but (e) are would be taxable as they were made within it is the third nonexempt retail sale in the a 12-month period between September 8, 199781 and July 17, 199882.</p> <p>Sale (f) is taxable as it was made during the same 12-month period sales (d) and (e) were made.</p> <p>Sale (g) is not taxable as it was the only sale made between November 10, 199882 and December 12, 199983.</p> <p>For Ssales (h), (i) and (j), only (j) would be are taxable as they were made because it was the third sale in a the 12-month period ending December 9, 20001984.</p>	

Issue Paper Number 00 - 012



- ☐ Board Meeting
- ☒ Business Taxes Committee
- ☐ Customer Services and Administrative Efficiency Committee
- ☐ Legislative Committee
- ☐ Property Tax Committee
- ☐ Other

PROPOSED REVISIONS TO AUDIT MANUAL CHAPTER 10, *OCCASIONAL SALES – SALE OF A BUSINESS*

I. Issue

Should revisions to Chapter 10 be incorporated into the Board of Equalization Audit Manual?

II. Staff Recommendation

Staff recommends that the proposed revisions as illustrated in the attached draft of Chapter 10 (Exhibit 2) be incorporated into Chapter 10 of the Audit Manual (AM). Staff recommends no operative date since the proposed revisions reflect current administrative policies and procedures.

III. Other Alternative(s) Considered

A. Alternative 1

As proposed by Mr. Eric Miethke from the Law Offices of Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP, amend AM section 1001.30, to provide that those transactions that are excluded from the definition of “sale” and those that are exempt from tax under the Sales and Use Tax Law should be excluded from the types of sales counted in determining whether that person has made more than two sales in a 12-month period requiring that person to hold a seller’s permit. This proposal has no operative date.

B. Alternative 2

As proposed by Mr. Eric Miethke, amend AM section 1001.35 to make sales subject to tax beginning with the third substantial, nonexempt sale in a 12-month period. This proposal has no operative date.

C. Alternative 3

Make no changes to the Audit Manual Chapter 10.

Issue Paper Number 00 - 012

IV. Background

The Audit Manual (AM) is the Board of Equalization's (Board) guide for conducting sales and use tax audits. The thirteen chapters contained within the AM incorporate procedures and techniques that have evolved over the years and have been proven to be sound and practical. Field auditors are required to carefully study these procedures and techniques to ensure that audits are conducted and reports are prepared in a clear and uniform manner consistent with approved audit policies and procedures.

AM Chapter 10, Occasional Sales - Sale of a Business, provides the field auditors with guidance in determining the application of tax to "occasional sales" and the sale of a business. This chapter discusses occasional sales and the taxable status of sales by going concerns, the transfer of assets by "others" (trustees, assignees, etc.), the sale of a business, and the contribution of assets to commencing corporations and other business entities. Several examples are given and discussed to help resolve many of the varied and complex situations encountered by field staff. The last revisions to Chapter 10 were made in May 1991.

Interested party meetings were held on January 13, 2000 and February 29, 2000. Staff received comments and letters proposing additional changes to the AM chapter. The majority of the interested parties' suggestions were included in staff's recommendation.

Discussion – Staff's Proposed Revisions to Chapter 10

The proposed revisions to AM Chapter 10 provide additional clarity in the area of sales by going concerns. Two new sections, which will replace AM section 1002.27, *Sales in Place of Fixtures, Machinery or Equipment*, are proposed to provide guidance and clarification of Regulation 1596, *Buildings and Other Property Affixed to Realty*. The remainder of the chapter was updated for clarity and new terminology.

Sales of Buildings and Minerals (AM Section 1002.30)

This proposed section explains that the application of tax to the sale of buildings and minerals, or the like, affixed to land depends on whom the contract or agreement of sale between the seller and buyer specifies will make the severance from the real property. If the seller severs the buildings or minerals, a taxable sale of tangible personal property occurs. If the buyer severs the buildings or minerals, no sale of tangible personal property occurs. Examples of severance of property are provided in this section.

Transfers in Place of Affixed Fixtures, Machinery, Equipment or Draperies (AM Section 1002.35)

This proposed section explains Regulation 1596(c) and a related court decision, *United States Lines Inc. v. State Board of Equalization (1986) 182 Cal.App.3d 529*, which provide that the transfer in place of fixtures affixed to the land by the lessee of the land is a sale of tangible personal property when the lessee has the right to remove the items as trade fixtures. The regulation and decision were based on the right to remove and not the contemplation of removal by contract of sale as currently stated in AM Section 1002.27. Situations involving contemplation and the right of removal are addressed in proposed AM section 1002.35 in four separate categories: 1) the transfer with concurrent sale of land or building to purchaser; 2) transfer without concurrent sale of land or buildings to purchaser; 3) transfers by real property lessee; and 4) transfers by third party lessor. Emphasis is also placed on the need for field auditors to first verify that the fixtures, machinery, or equipment are affixed, actually or constructively, to the real property prior to determining if tangible personal property has been sold.

FORMAL ISSUE PAPERIssue Paper Number 00 - 012**Discussion – Interested Party’s Proposed Revisions**Determination of the Number of Sales (AM Section 1001.30); and Must Qualify in Each 12-Month Period (AM Section 1001.35)

Staff received a letter dated March 16, 2000 from Mr. Eric Miethke of the Law Offices of Nielson, Merksamer, Parrinello, Mueller & Naylor, LLP. Mr. Miethke is representing the Motion Picture Association of America (MPAA) on this issue. In his letter, Mr. Miethke addressed three issues:

- What sales should qualify when determining whether a person has made more than two sales in a 12-month period. He proposed to exclude from the types of sales counted, those sales excluded from the definition of a “sale” or exempt from tax under the Sales and Use Tax Law.
- Whether all the sales should be considered as subject to tax when a person qualifies as a seller by making three substantial sales in a 12 month period. Mr. Miethke proposed to make only the third substantial sale in the 12-month period taxable, with the first two sales exempt as occasional sales and not subject to tax.
- The proper treatment of limited liability companies (LLCs). Mr. Miethke was concerned that single member LLCs be treated the same as multiple member LLCs and that AM section 1001.10 be expanded to add language about the proper treatment of LLC member interests.

Mr. Miethke followed up his letter with another letter dated April 11, 2000. Mr. Miethke provided additional comments concerning their proposed revisions relating to the retroactive application of tax to the first two sales in a 12-month period and the types of sales that should be counted in determining whether one should obtain a seller’s permit. Mr. Miethke and the MPAA feel that it is unreasonable to treat a closing business as a retailer of its assets simply because there were two prior sales of relatively minor amounts. He feels that the staff’s current interpretation of how the RTC applies in these cases creates inequities, particularly when the sale of a business is involved, since the sales price of the assets is generally disproportionate to the amounts received on the previous two sales of the property or equipment.

AM 1001.30, Determination of Number of Sales

In his letter of March 15, 2000, Mr. Miethke proposed that the following language be added to AM section 1001.30:

(e) Sales that are excluded from the definition of “sale” or are otherwise exempt from tax under the Sales and Use Tax Law.

This language would be added to the current examples of other types of sales excluded from the determination of whether a person has made more than two sales in a 12 month period. Mr. Miethke feels that the proposed language is needed because staff is incorrectly interpreting the RTC sections defining a sale subject to tax. In particular, Mr. Miethke feels that staff’s interpretation of RTC section 6014 is too broad. This section, which defines “seller,” states the following:

“Seller” includes every person engaged in the business of selling tangible personal property of a kind the gross receipts from the retail sale of which are required to be included in the measure of the sales tax.

FORMAL ISSUE PAPERIssue Paper Number 00 - 012

For the purposes of this section, the phrase “tangible personal property of a kind the gross receipts from the retail sale of which are required to be included in the measure of the sales tax” includes all tangible personal property of a kind the gross receipts from the retail sale of which is, or would be, required to be included in the measure of the sales tax if sold at retail whether or not the tangible personal property is ever sold at retail or is suitable for sale at retail.

In his letter dated April 11, 2000, Mr. Miethke agreed that the language of section 6014 would include sales for resale as transactions that should be included in determining whether a person is a seller. However, Mr. Miethke feels that staff’s inclusion of other types of exempt sales is incorrect. Mr. Miethke noted that Regulation 1595(a)(4)(a) contains four types of sales that are not counted in the 12-month period test and states that there is no statutory basis in the occasional sales statutes cited in the regulation for the exclusions. Mr. Miethke notes that one factor appears to be whether the sales are exempt under the RTC.

Mr. Miethke maintains that staff has the discretion to exclude exempt sales from the “more than two sales in a 12-month period test” and supports his position by referencing Annotations 395.0670 (6/24/91) and 395.0673.250 (8/29/96). Annotation 395.0670 counts resale transactions when determining whether a seller has made a series of sales sufficient in number, scope and character to require the holding of a seller’s permit. It also includes wholesalers as “sellers” that need a seller’s permit unless they sell property like food products for human consumption, which sales are always exempt. Annotation 395.0673.250 gives an example of assets sold by a medical laboratory which includes equipment, human blood, vehicles, and a final sale of equipment. The laboratory’s sale of human blood, property of a type which would never be subject to sales tax (even at retail), are not counted, nor are the vehicles registered that are under the Vehicle Code.

Staff believes that Section 6014 includes all sales of tangible personal property the retail sales of which could be taxable, whether or not such property is in fact ever sold at retail. The fact that a sale of such property may be nontaxable either because the sale is occasional or because an exemption is allowed under the law does not change the nature of the property from “tangible personal property of a kind the gross receipts from the retail sale of which is, or would be, required to be included in the measure of the sales tax if sold at retail” to some other kind of property. The circumstances surrounding a particular sale do not change this. Staff’s position has been upheld by the case *Davis Wire Corp. v. State Board of Equalization* (1976) 17 Cal.3d 761. In this opinion the court states that “section 6014 requires only that the goods be “*of a kind*” (italics added) that their retail sale would be taxable; it does not require that goods must actually be sold at retail by the manufacturer or, for that matter, by anyone else.” (*Id.* at pp. 764-765.)

AM section 1001.30 does include examples of transactions that should not be counted as sales for purposes of determining whether a person is a seller. However, none of these examples refer to tangible personal property which is being sold by the person in a series of sales which requires the holding of a permit. In example (a), the person is making a trade-in incidental to a purchase. In examples (b) and (c), the auctioneer or racing association that is making the sales on behalf of the person is the retailer, not the person. In example (d), the person is making a sale of a vehicle, vessel, or aircraft, but the tax on the transaction is use tax imposed on the purchaser.

Staff believes that the annotations cited by Mr. Miethke support staff’s position. Annotation 395.0670 provides that nontaxable sales for resale should be counted when determining whether a person is a seller. Annotation 395.0673.250 provides that sales of property of a type which would never be subject to sales

FORMAL ISSUE PAPERIssue Paper Number 00 - 012

tax (even at retail) are not used to determine whether a person is a “seller.” The example cited is human blood. Staff is in agreement that sales of this type of property should not be counted since a person who only makes sales of human blood is not a seller. However, the exclusion does not extend to all exempt sales, but rather only to sales of property, the sale of which at retail is never subject to tax. For example, sales in interstate or foreign commerce, sales of periodicals, and sales of printed sales messages are all taxable when sold at retail unless certain conditions are satisfied. On the other hand, sales of blood are never taxable regardless of any other factor.

Staff is of the opinion that AM section 1001.30 correctly states the application of the Sales and Use Tax Law when determining if a person has made sufficient sales to qualify as a seller. Any desired changes should be pursued through legislative amendments to existing law, not through revisions to the Audit Manual.

AM 1001.35, Must Qualify in Each 12-Month Period

In the letters dated March 15, 2000 and April 11, 2000, Mr. Miethke noted that staff’s position that all sales in a 12 month period should be subject to tax results in a “lookback” assumption that is unfair. Mr. Miethke pointed out that the seller is frequently unable to collect sales tax reimbursement since the seller did not know at the time of the initial sales that more than two sales were going to be made in a 12-month period, and if tax is collected on the first sale, it is excess tax reimbursement since tax is not currently due and may never be due if more than two sales are not made. Mr. Miethke and the MPAA feel that there is no language in either RTC sections 6014, 6006.5 or Regulation 1595, which legally compels a seller to report all sales in a 12 month period as subject to tax, stating that section 6014 does not set forth any information about when someone becomes a seller. Although section 6006.5(a) provides that a person is a seller if he or she makes sales “sufficient in number, scope and character,” Mr. Miethke notes that the Legislature did not prescribe either the number of sales or the time period within which the sales must occur. Rather, Regulation 1595(a)(4) defines “sufficient in number, scope and character” and states that “the gross receipts from all such sales are subject to tax.” Mr. Miethke feels that it is not until one reaches this point that one is required to pay tax on gross receipts from such sales and he interprets “such sales” as “sales of taxable property.” On this basis, Mr. Miethke disagrees with the staff’s interpretation that the first and second retail sale of a series of sales requiring a seller’s permit are subject to tax. He proposes that AM section 1001.35 be amended to “make the third substantial, nonexempt retail sale in a 12-month period taxable.”

Staff is of the opinion that the language of Sales and Use Tax Law and Regulation 1595 require any person qualifying as a “seller” to report as subject to tax all nonexempt retail sales made, including all sales in the series making that person a seller. Staff’s position is based on the provisions of RTC sections 6367, 6006.5, 6014, 6015, and 6051, and the specific language of Regulation 1595. Section 6014 defines a “seller” as every person engaged in the business of selling tangible personal property of a kind the gross receipts from the retail sale of which are required to be included in the measure of the sales tax. RTC section 6367 exempts from sales and use tax “occasional sales” (other than sales of vehicles required to be registered or identified under the Vehicle Code, vessels and aircraft). RTC section 6006.5 defines occasional sales to exclude certain sales of tangible personal property “provided the sale is not one of a series of sales sufficient in number, scope, and character to constitute an activity for which he or she is required to hold a seller’s permit.” The first and second sale in a series of sales are not occasional sales. Regulation 1595(a)(4)(A) defines “sufficient in number” as three sales within a 12-month period. RTC section 6015 defines a retailer as “every seller who makes any retail sale or sales of tangible personal property.” RTC 6051 imposes tax on the gross receipts of the sale of all “tangible personal property sold

FORMAL ISSUE PAPERIssue Paper Number 00 - 012

at retail in this state.” Consequently, if a person qualifies as a “seller,” that is, makes sales sufficient in number, scope, and character, this person must acquire a permit and report the tax on all retail sales made during the qualifying 12-month period. The statutes do not provide an occasional sale exemption for any retail sales made during the period.

Staff is of the opinion that AM section 1001.35 correctly states the application of the Sales and Use Tax Law to sales made by a person qualifying as a seller. Any changes should be pursued through amendments to existing law, not through revisions to the Audit Manual.

Proposed language now has been added to the chapter to clarify what constitutes a sale in a “substantial” amount, in determining when more than two substantial sales in a 12-month period are made. The Board considered the issue of what constitutes sales in substantial amounts in the Memorandum Opinion of Pratt North Plaza Associates (10/28/93). The Board concluded that a sale of \$400 is a substantial amount for the purposes of Regulation 1595. The Board specifically did not address the issue of whether sales in amounts of less than \$400 are substantial. Based on the Memorandum Opinion, language has been proposed to quantify the term substantial as \$400 or more, and possibly less than \$400 as it relates to Regulation 1595. The chapter advises auditors to consult with their supervisors if there is a question of whether sales are for substantial amounts.

Occasional Sales (AM Section 1001.10)

Included in Mr. Miethke’s proposals for revisions to the Audit Manual was the incorporation of a statement on the proper treatment of limited liability companies (LLCs). More specifically, Mr. Miethke proposes that the sale of a member’s interest in LLCs with perpetual life should be treated as the sale of an intangible, and not as a sale of a portion of the underlying assets of the LLC. Staff worked with Mr. Miethke to draft language to incorporate the proper treatment of a transfer of a member’s interest in a LLC into section 1001.10, Occasional Sales, and section 1004.40, Transfer of Partnership Interest.

Sale of a Business; When Not Taxable (AM Section 1004.10(d))

Staff received one comment from Deloitte and Touche LLP requesting an additional revision to Chapter 10. In a letter dated January 10, 2000, concern was expressed with section 1004.10(d) regarding when a sale of a business would not be subject to tax. The proposed revision to AM section 1004.10(d) stated, “tax does not apply to the sale of property...not otherwise taxable solely because of the nature of activities carried on in a totally unrelated business.” Their concern was that auditors would be misled by the implied “totally unrelated business” test as a fundamental rule. Section 6006.5(a), Regulation 1595, and case law do not use the term “totally unrelated business” to determine whether tax applies to a sale. Therefore, Deloitte and Touche LLP propose that the Audit Manual not be worded to imply that a business must be totally unrelated for purposes of determining whether the occasional sale exemption applies.

Regulation 1595, *Occasional Sales – Sale of a Business – Business Reorganization* and case law do not reference a “totally unrelated business” test to determine if the sale of assets is subject to tax. Regulation 1595(a)(3) states, “tax does not apply to the sale of property held or used by the seller in the non-selling **endeavors** which do not require the holding of a permit unless that sale is one of a series of sales requiring the holding of a seller’s permit.” (emphasis added) Staff agrees with Deloitte and Touche LLP, that the reference to activities carried on in a “totally unrelated business” in determining if asset sales of related businesses is subject to tax is not accurate. If a business is engaged both in activities that require a seller’s permit and activities that do not require a seller’s permit, these activities do not have to be in

FORMAL ISSUE PAPERIssue Paper Number 00 - 012

totally unrelated businesses to meet the criteria of occasional sales. To be consistent with Regulation 1595, staff now recommends changing the terminology used in AM section 1004.10(d) to state “an entirely separate endeavor” rather than “a totally unrelated business.”

In addition to the language clarification proposed by industry and staff regarding separate endeavors, it was suggested that an example be incorporated to illustrate the application of tax to a separate endeavor. Staff incorporated the specific facts of the *Ontario Community Foundation, Inc. v. State Board of Equalization* (1984) 35 Cal.3d 811, which involved a hospital making an occasional sale of its assets used in the nonselling medical and nursing services activities, while maintaining a permit for the pharmacy and cafeteria activities.

Where Stock and Consideration Received For Assets Transferred (AM Section 1005.10)

Associated Sales Tax Consultants (ASTC) proposed in its memorandum dated March 7, 2000, what it felt is a more realistic example for the formula applied when assets are transferred to commencing corporations and the transferor receives consideration. The following example in AM section 1005.10 illustrates how to calculate the taxable measure when taxable consideration is received by the transferor:

$$\frac{\text{Selling Price of the Tangible Personal Property Transferred for Use, Not Resale}}{\text{Selling Price of All Property Transferred}} \times \text{All Consideration} = \text{Taxable Measure}$$

This formula is based on Regulation 1595(b)(4), which states that the gross receipts from the transfer are “allocated among the taxable portion and the nontaxable portion by dividing the selling price of the tangible personal property transferred to the purchaser for use rather than resale by the selling price of all property transferred.” The gross receipts are then multiplied by the ratio to determine the taxable measure. In response to the concerns raised by ASTC, staff has proposed a revision to AM section 1005.10 stating, “selling price is presumed to be book value of the assets transferred. Goodwill, patents, and other intangibles may be transferred and accounted for in the formula if these assets existed on the books of the transferor prior to their transfer to the commencing corporation. However, the transferor may establish that the selling price was a price other than book value, such as appraised value, for all assets transferred.”

ASTC was concerned that the formula and definition of “selling price of all property transferred” in the originally proposed revision did not accurately represent the types of transactions that occur when businesses make such transfers. After reviewing the changes made by staff based on ASTC’s concerns, ASTC withdrew its disagreement with the proposed revision to AM section 1005.10.

The proposed revision is also referenced in AM section 1004.35, Contributions to Capital of a Partnership or Joint Venture. This section was revised in the same manner.

FORMAL ISSUE PAPERIssue Paper Number 00 - 012**V. Staff Recommendation****A. Description of the Staff Recommendation**

Staff recommends that the proposed revisions as illustrated in the attached draft of Chapter 10 (Exhibit 2) be incorporated into Chapter 10 of the Audit Manual. Staff recommends no operative date since the proposed revisions reflect current administrative policies and procedures.

B. Pros of the Staff Recommendation

- Provides consistency with current policies and procedures.
- Clarifies current guidelines.
- Provides guidance to auditors in determining the application of tax to occasional sales and the sale of a business.

C. Cons of the Staff Recommendation

None.

D. Statutory or Regulatory Change

None required.

E. Administrative Impact

None. Auditors are currently referencing the Audit Manual for guidance in determining the taxability of transactions.

F. Fiscal Impact**1. Cost Impact**

None.

2. Revenue Impact

None. (*Revenue Estimate will be distributed separately.*)

G. Taxpayer/Customer Impact

None.

FORMAL ISSUE PAPER

Issue Paper Number 00 - 012

H. Critical Time Frames

No operative date is proposed. Upon Board approval, revised AM Chapter 10 will be posted on the Board's Website and distributed to staff.

VI. Alternative 1

A. Description of the Alternative

As proposed by Mr. Eric Miethke from the Law Offices of Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP, amend AM section 1001.30, to provide that those transactions that are excluded from the definition of "sale" and those that are exempt from tax under the Sales and Use Tax Law should be excluded from the types of sales counted in determining whether that person has made more than two sales in a 12-month period requiring that person to hold a seller's permit. This proposal has no operative date.

B. Pros of the Alternative

Incorporates interested party's proposal.

C. Cons of the Alternative

Requires statutory and regulatory changes.

D. Statutory or Regulatory Change

Requires statutory change to RTC section 6014 and an amendment to Regulation 1595(a)(4)(A)(2).

E. Administrative Impact

None.

F. Fiscal Impact

1. Cost Impact

Cost is absorbable.

FORMAL ISSUE PAPER

Issue Paper Number 00 - 012

2. Revenue Impact

Pending. (*Revenue Estimate to be distributed separately.*)

G. Taxpayer/Customer Impact

If this proposal is approved, a limited number of taxpayers will no longer be required to hold a seller's permit or be required to report tax on their sales.

H. Critical Time Frames

This alternative would have no operative date, assuming Mr. Eric Miethke is correct in his contention that the current interpretation is incorrect. This would be an administrative reinterpretation of the existing statute.

VII. Alternative 2

A. Description of the Alternative

As proposed by Mr. Eric Miethke, amend AM section 1001.35 to make sales subject to tax beginning with the third substantial, nonexempt sale in a 12-month period. This proposal has no operative date.

B. Pros of the Alternative

Incorporates interested party's proposal.

C. Cons of the Alternative

Requires statutory and regulatory change.

D. Statutory or Regulatory Change

Requires statutory change to section 6006.5 and amendment to Regulation 1595(a)(4).

E. Administrative Impact

None.

FORMAL ISSUE PAPER

Issue Paper Number 00 - 012

F. Fiscal Impact

1. Cost Impact

None.

2. Revenue Impact

Pending. (*Revenue Estimate to be distributed separately.*)

G. Taxpayer/Customer Impact

If this proposal is approved, a limited number of taxpayers will have a reduction in reportable taxable sales.

H. Critical Time Frames

This alternative would have no operative date, assuming Mr. Eric Miethke is correct in his contention that the current interpretation is incorrect. This would be an administrative reinterpretation of the existing statute.

VIII. Alternative 3

A. Description of the Alternative

Make no changes to Audit Manual Chapter 10.

B. Pros of the Alternative

None.

C. Cons of the Alternative

AM Chapter 10 would not be consistent with current policies and procedures.

D. Statutory or Regulatory Change

None.

FORMAL ISSUE PAPER

Issue Paper Number 00 - 012

E. Administrative Impact

None.

F. Fiscal Impact

1. Cost Impact

None.

2. Revenue Impact

Pending. (*Revenue Estimate to be distributed separately.*)

G. Taxpayer/Customer Impact

None.

H. Critical Time Frames

None.

Prepared by: Program Planning Division, Sales and Use Tax Department

Current as of: April 20, 2000



**PROPOSED REVISIONS TO AUDIT MANUAL CHAPTER 10,
*OCCASIONAL SALES – SALES OF A BUSINESS***

Staff Recommendation

Staff recommends that the proposed revisions as illustrated in the attached draft of Chapter 10 (Exhibit 2 of the issue paper) be incorporated into Chapter 10 of the Audit Manual. Staff recommends no operative date since the proposed revisions reflect current administrative policies and procedures.

Alternative 1:

As proposed by Mr. Eric Miethke from the Law Offices of Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP, amend AM section 1001.30, to provide that those transactions that are excluded from the definition of “sale” and those that are exempt from tax under the Sales and Use Tax Law should be excluded from the types of sales counted in determining whether that person has made more than two sales in a 12-month period, requiring that person to hold a seller’s permit. This proposal has no operative date.

Alternative 2:

As proposed by Mr. Eric Miethke, amend AM section 1001.35 to make sales subject to tax beginning with the third substantial, nonexempt sale in a 12-month period. This proposal has no operative date.

Alternative 3:

Make no changes to the Audit Manual Chapter 10.

Background, Methodology, and Assumptions

Staff Recommendation:

There is nothing in the proposed revisions to Chapter 10 of the Audit Manual that would impact revenues.

Alternative 1:

Currently, the sale of tangible personal property included with the sale of a business is taxable if the business has a seller's permit. For those businesses that do not require a seller's permit, the sale of tangible personal property included with the sale of a business is considered to be an occasional sale and not subject to tax unless within the prior 12 months the business made two or more other sales of tangible personal property of a kind, the gross receipts from the retail sale of which are required to be included in the measure of the sales tax. Alternative 1 would, when determining whether a person has made more than two sales in a 12-month period, exclude exempt sales even if those sales were of a kind, the gross receipts from the retail sale of which are required to be included in the measure of the sales tax.

If a business makes sales of a kind included in the measure of tax for sales and use tax purposes but all of the sales of the business are exempt sales in interstate commerce, the business would not be required to hold a seller's permit. If the sale of such a business includes the sale of tangible personal property, the exempt sales in interstate commerce would be considered in determining whether the business has made more than two sales in a 12-month period because the sales were of property of the type of which the retail sale is subject to sales tax.

Alternative 1 would result in a loss of sales and use tax revenue, as some sales that would be subject to tax under current law would now be considered occasional sales and not subject to tax. Staff believes that very few businesses would fit the above circumstance. Most businesses that sell tangible personal property, even those making mostly exempt sales, are required to hold seller's permits. It is estimated that the revenue impact of Alternative 1 would be less than \$500,000.

Alternative 2:

Alternative 2 would provide that only the third substantial sale in a 12-month period would be taxable and the first two would not be subject to tax. This proposal would result in a loss of sales and use tax revenue. Unfortunately the Board has no data on this issue. We do not know how many nonpermitized businesses would make sales that would qualify them for this exemption. However, there are many nonpermitized businesses in California. If a nonpermitized business sells all or nearly all of its assets in a first sale, then sells a few assets in subsequent sales, the initial two sales would not be subject to tax under this proposal. This proposal creates the potential for a significant revenue loss.

Alternative 3:

Alternative 3 would have no revenue impact.

Revenue Summary

Staff Recommendation:

The staff recommendation has no revenue effect.

Alternative 1:

The revenue loss under Alternative 1 is estimated to be less than \$500,000.

The effect of this proposal would be retroactive and would create a potential for refunds for 3 years.

Alternative 2:

The potential revenue loss from making sales subject to tax beginning with the third substantial, nonexempt sale in a 12-month period could be significant.

The effect of this proposal would be retroactive and would create a potential for refunds for 3 years.

Alternative 3:

Alternative 3 has no revenue effect.

Preparation

This revenue estimate was prepared by David E. Hayes, Statistics Section, Agency Planning and Research Division. This revenue estimate was reviewed by Ms. Laurie Frost, Chief, Agency Planning and Research Division and Ms. Freda Orendt-Evans, Program Planning Manager, Sales and Use Tax Department. For additional information, please contact Mr. Hayes at (916) 445-0840.

Current as of April 21, 2000

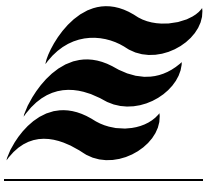
AUDIT MANUAL

Chapter 10

~~OCCASIONAL SALES – SALE
OF A BUSINESS~~
Occasional Sales – Sale of a Business

~~Sales and Use Tax~~ *Sales and Use Tax*

Sales and Use Tax Department



STATE BOARD
OF EQUALIZATION

Department of Business Taxes

California State Board Of Equalization

April 2000

TABLE OF CONTENTS**OCCASIONAL SALES – SALE OF A BUSINESS 1000.00****INTRODUCTION1001.00**

General	1001.05
Occasional Sales-Exempt	1001.10
Definitions.....	1001.15
Kinds of Occasional Sales.....	1001.20
Number of Sales.....	1001.25
Determination of Number of Sales.....	1001.30
Must Qualify in Each 12-Month Period	1001.35
Sales of Retailer's Personal Property.....	1001.37
Vehicles, Mobilehomes, Commercial Coaches, Vessels and Aircraft Occasional Sales	1001.40

SALES BY GOING CONCERNS.....1002.00

General	1002.05
Sales of Assets by Certain Permittees May Be Occasional.....	1002.10
Location of Asset Sold May Determine Taxable Status.....	1002.15
<u>Sales of Property Used Exclusively in Handling Personality Exempted By Person Not Required to Hold Seller's Permit Because of by-Nature of or Use.....</u>	<u>1002.25</u>
<u>Sales in Place of Fixtures, Machinery or Equipment</u>	<u>1002.27</u>
<u>Sale of Buildings and Minerals</u>	<u>1002.30</u>
<u>Transfers in Place of Affixed Fixtures, Machinery, Equipment, or Draperies</u>	<u>1002.35</u>
<u>Sale of Fixtures After the Subsequent to Date of eClose-o-Out.....</u>	<u>1002.430</u>
<u>Manufacturers and Wholesalers</u>	<u>1002.45</u>

TRANSFER OF ASSETS BY OTHERS1003.00

Sales by an Executor, Administrator, Etc.....	1003.05
Sales by Trustee in Bankruptcy.....	1003.10
Sales by Assignees	1003.15
Transfer of Property to a Mortgagee (Lender)	1003.20
Transfer of Property of DebtorsBankrupts, Decedents, Etc.	1003.25
Transfer of Property to Relatives and Others	1003.30
Transfers of Noncommunity Property Between Husbands and Wives	1003.35
Single Sale by Out-of-State Retailer	1003.40
Manufacturers and Wholesalers	1002.35

SALE OF A BUSINESS1004.00

When Subject to the Tax	1004.05
When Not Taxable	1004.10
Method of Determining If Ownership Changes Substantially	1004.15
Examples of Taxable and Nontaxable Transfers.....	1004.20
Bulk Sales of Businesses (Sales Price of Tangible Personal Property Not Specified).....	1004.25
Bulk Sale of a Business - Conditional Sales Contract.....	1004.30
Assumption of Conditional Sales Contract	1004.32
Contributions to Capital of a Partnership or Joint Venture	1004.35
Transfer of Property by a Partnership	1004.40
Transfer of Assets in Payment of Partnership Loans	1004.45

TABLE OF CONTENTS (Continued)

CORPORATIONS.....	1005.00
Contributions to Commencing Corporations	1005.05
Where Stock and Other Consideration Received for Assets Transferred	1005.10
Exchange of Property for Return of Stock	1005.15
Pro Rata or Rated <u>Limited</u> Distribution of Property	1005.20
Transfers to More Than One Entity	1005.25
Consolidations and Mergers	1005.30

CHAPTERchapter 10**OCCASIONAL SALES - SALE OF A BUSINESS
1000.00****INTRODUCTION****1001.00****GENERAL****1001.05**

This chapter is planned to aid the field auditor in resolving many of the varied and complex problems ~~that which~~ arise as a result of an "occasional sale" or the sale of a business. ~~It is realized~~ The auditor ~~may will~~ encounter situations ~~that which~~ are not fully covered in this chapter. If ~~after reviewing the material herein~~, the auditor is unable to reach a decision about the taxable status of the transactions in question after reviewing the following material, the auditor should consult his or her supervisor.

OCCASIONAL SALES-EXEMPT**1001.10**

Occasional sales as defined in Section 6006.5 of the Revenue and Taxation Code~~law~~ are exempt under Section 6367. In addition, transfers of tangible personal property~~contributions to~~ capital of a ~~to~~ commencing or existing partnerships, joint ventures, limited liability companies (LLCs), and corporations, ~~are not subject to tax. Transfers of tangible personal property~~ under the following conditions, are not in exchange for an interest having measurable value and are not subject to tax~~constitute exempt contributions of capital~~:-

- (1)~~(a)~~ To a commencing partnership or joint venture solely in exchange for an ownership interest in the partnership or joint venture.
- (2)~~(b)~~ To an existing partnership or joint venture solely in exchange for an increased ownership interest, or the enhancement of the value of the existing ownership interest.
- (3)~~(c)~~ To a commencing corporation or LLC solely in exchange for shares of the first issue of stock of the corporation or for a first issuance of an interest in the commencing LLC.
- (4)~~(d)~~ To an existing corporation or LLC, if no shares of stock, interest, or other consideration is received, even though the value of the shares or interest already held by the person contributing the property is enhanced.

If a transfer is an occasional sale under Section 6006.5 and exempt under Section ~~6367~~6006.5, the auditor need not be concerned about whether it is nontaxable as a contribution. If the transaction is nontaxable as a contribution, the auditor need not be concerned whether the requirements of Section 6006.5, 6281 or 6367 are met.

(Cont.) 1001.10

The sale or purchase of a shareholder's shares of stock of a corporation is not a sale of tangible personal property and is not subject to tax. The sale or purchase of a partner's partnership interest in a general partnership or limited partnership or limited liability partnership, where the transfer of the interest does not cause or result in a dissolution of the partnership, is not a sale or purchase of tangible personal property and is not subject to tax. The sale or purchase of a member's membership interest in a limited liability company, where the transfer of the membership interest does not cause or result in a dissolution of the limited liability company, is not a sale or purchase of tangible personal property and is not subject to tax.

DEFINITIONS**1001.15**

- (a) **Bulk Sale** - Sale of a business for a lump sum with no breakdown of the selling price of each asset or group of assets sold.
- (b) **Commencing Corporation** - One that for the first time in its corporate life is issuing stock.
- (c) **Commencing Partnership** - One that is new and did not exist before.
- (d) **Going Concern** — Business that is currently operating and will continue to operate in the future.
- (e) **Joint Venture** - A form of partnership of limited duration generally for a single transaction or specific project. The main difference between the joint venture and other partnerships is that a joint venture generally dissolves when the project is completed.
- (f) **Merger** - The combination of entities that occurs when one or more entities are absorbed into one entity with that one entity continuing in existence. In a statutory merger, the merger and transfer of assets and liabilities occur pursuant to state law authorizing mergers. The disappearing entity(s) transfer their assets and liabilities to the surviving entity.
- (g) **Number, Scope and Character of Sales.**
 - Number — More than two sales, including the one in question, in any 12-month period (not calendar year).
 - Scope - The extent of the sales measured by their frequency or dollar volume.
 - Character - Similarity in type and value giving effect to the relationship of taxpayer's regular business operations.

~~For the sake of brevity as well as to insure unity of thought, several of the expressions used in this chapter should be defined:~~

- ~~(a)(h)~~ **Occasional Sale** - A transaction that falls within the provision of Section 6006.5.
- (i) **Occasional Seller** - Any person engaged in an activity not requiring a seller's permit, but making occasional sales of tangible personal property.
- (j) **Partnership** - Is an association of two or more persons to carry on as co-owners of a business for profit.
- (k) **Person** - Includes any individual, firm, partnership, joint venture, limited liability company (LLC), association, social club, fraternal organization, corporation, estate, business trust, receiver, assignee for the benefit of creditors, trustee, trustee in bankruptcy, syndicate, the United States,

this state, any county, city and county, municipality, district, or other political subdivision of this state, or any other group or combination acting as a unit.

- (l) **Real or Ultimate Ownership** - Stockholders, bondholders, partners, members of an LLC or other persons holding an ownership interest in the corporation or other entity.
- (m) **Reorganization** - Includes major changes in the financial structure of a group of related corporations resulting in alterations in the rights and interests of owners and security holders; usually involves a recapitalization or merger.
- ~~(b)(n) **Seller** - Any person individual, partnership, joint venture, corporation or other entity engaged in an activity requiring a seller's permit engaged in the business of selling tangible personal property of a kind the gross receipts from the retail sale of which are required to be included in the measure of tax.~~
- (o) **Statutory Merger** - When one or more entities are merged into another entity pursuant to Sections 1100-1305, 6010-6022, or 15678.1-15678.9 of the California Corporations Code, or similar laws of this and other states.
- ~~(c) **Occasional Seller** - Any individual, partnership, joint venture, corporation or other entity engaged in an activity not requiring a seller's permit, but making occasional sales of tangible personal property.~~
- ~~(d) **Property** - any tangible personal property held or used in a business activity.~~
- ~~(e)(p) **Substantially All** - 80 or more percent or more of the total tangible personal property held or used by a retailer in the course of an activity or activities for which he or she is required to hold a seller's permit would be required to hold a seller's permit if the activities were conducted in this state, including tangible personal property located outside this state.~~
- ~~(f)(q) **Substantially Similar Ownership** - Ownership directly or indirectly of 80 or more percent or more of the total tangible personal property both before and after the transaction.~~
- ~~(g) **Real or Ultimate Ownership** - Stockholders, bondholders, partners or other persons holding an interest in the corporation or other entity. Holders of debenture bonds are not considered owners or part owners of a corporation.~~
- ~~(h) **Number, Scope and Character of Sales.**~~
 - ~~• (1) **Number** - Three or more sales, including the one in question, in any 12 month period (net calendar year).~~
 - ~~• (2) **Scope** - The extent of the sales measured by their frequency or dollar volume.~~
 - ~~• (3) **Character** - Similarity in type and value giving effect to the relationship of taxpayer's regular business operations.~~
- ~~(i) **Going Concern** - One which is currently operating and will continue to operate in the future.~~
- ~~(j) **Bulk Sale** - Sale of a business for a lump sum with no breakdown of the selling price of each asset or group of assets sold.~~
- ~~(k) **Commencing Partnership** - One which is new and did not exist before.~~
- ~~(l) **Commencing Corporation** - One which for the first time in its corporate life is issuing stock.~~

~~(m)Consolidation—Is the combination of two or more enterprises, accomplished by the transfer of their net assets to a new corporation organized for the purpose.~~

~~(n)Merger—Is the fusion of two or more enterprises through the direct acquisition by one of the net assets of the other or others. A merger differs from a consolidation in that in a merger no new concern is created, whereas in a consolidation a new corporation or entity acquires the net assets of the combining units.~~

~~(o)Statutory Merger or Consolidation—Is when one or more corporations are merged into another corporation pursuant to Sections 1100-1305 of the California Corporations Code, or similar laws of other states.~~

~~(p)Reorganization—Includes major changes in the financial structure of a group of related corporations resulting in alterations in the rights and interests of security holders; usually involves a recapitalization, consolidation or merger.~~

~~(q)Joint Venture—A separate entity formed of two or more entities (e.g., individuals, corporations) for the completion of a specific project. The joint venture is similar to a partnership. The main difference is that the joint venture is generally dissolved when the project is completed.~~

KINDS OF OCCASIONAL SALES

1001.20

Occasional sales fall into several general categories.

- Sales by persons not defined engaged as a sellers as defined in the Sales and Use Tax Law.
- Sales by occasional sellers.
- Sales of businesses meeting the exemption requirements of Section 6367 as defined in Section 6006.5(b) ~~of the law.~~
- Sales of vehicles, mobilehomes, commercial coaches, vessels and aircraft meeting the requirements of Sections 6281 and 6285. (See A.M. Section 1001.40)

Examples of ~~activities~~ persons ~~generally~~ **not** requiring a sellers permit are:

- a) Service enterprises in general:
 - (1) Barbershops and beauty salons Accounting or law firms.
 - (2) Launderers and cleaners.
 - (3) Transportation firms.
- b) ~~Entities~~ Persons dealing exclusively in tangible personal property of a kind the retail sale of which is exempt by statute:
 - (1) Bakeries.
 - (2) Dairy products.
 - (3) Food processors.

(Cont.) 1001.20

c) Persons who grow and sell hay exclusively to beef cattle feed lots or dairies or through farmer cooperatives.

b)d) Persons selling tangible personal property exclusively in the following types of transactions:

- Persons whose sales are exclusively in interstate or foreign commerce.
- Persons whose sales consist solely of feed for food animals or animals held for resale.

~~(4) Publishers of newspapers and exempt periodicals.~~

However, operators of any of the foregoing activities described in (a) (b) or (c) do require seller's permits if they do make sales of sufficient number, scope and character, e.g.i.e., dish rags, used fork lifts, non-food drinks, job printing, etc. For other sales by persons described in (d), see AM 1002.25.

NUMBER OF SALES **1001.25**

~~Generally speaking, more than two sales of tangible personal property for substantial amounts during any 12-month period (not calendar year) requires the holding of a seller's permit.~~

DETERMINATION OF NUMBER OF SALES **1001.30**

~~Generally speaking, m~~More than two sales of tangible personal property for substantial amounts during any 12-month period (not calendar year) requires the holding of a seller's permit. In determining whether a person has made ~~three or more~~ than two sales during a 12-month period, the following types of sales are ~~to be excluded:~~

- a) Trade-ins made incidental to a nonselling activity. For example, an accountant trading in an old copier for a new one.
- b) Sales made by an auctioneer on behalf of the ~~persons~~subject (auctioneer is the retailer and liable for the tax not the person.)
- c) Sales of horses through claiming races (racing association is ~~the retailers~~seller and liable for the tax not the person owning the horse.)
- d) Sales of vehicles, vessels or aircraft, ~~the sale of which is exempted~~ from the sales tax by Sections 6282 and 6283, but subject to use tax imposed on the purchaser.

~~Anyone~~A person engaged in a business which does not require the holding of a seller's permit is not liable for sales tax measured by the gross receipts from a retail sale of a piece of equipment used in the conduct of the business, even though he that person may have made a series of trade-ins of old for new equipment ~~for new, incidental to the business.~~ The sale of the equipment in question is not regarded as one of a series of sales, nor has the equipment ~~as having~~ been used in a selling activity and thus, the sale is an occasional sale.

If, however, in addition to the sale in question, two or more sales of substantial amounts have been made or are made in a period of 12 months, the sale is taxable regardless of whether even though the other sales were at retail, sales-for resale, or exempt from tax (for example, a sale in interstate commerce), all of the non-exempt sales at retail are subject to tax. If a person does not require a seller's permit, see also AM 1002.25.

(Cont.) 1001.30

In determining whether the sales are for “substantial” amounts, the auditor should consider all the facts of each situation. The Board has considered the issue of what constitutes sales in substantial amounts in the Memorandum Opinion of Pratt North Plaza Associates (10/28/93). The Board concluded that a sale of \$400 is a substantial amount for the purposes of Regulation 1595, and the Board specifically did not address the issue whether sales in amounts less than \$400 are substantial. Until otherwise directed, any sale of \$400 or more clearly counts as a sale for a substantial amount, and sales less than \$400 may also be considered substantial. Auditors should consult with their supervisor if any questions arise in determining whether a sale of tangible personal property is a sale for a “substantial” amount.

MUST QUALIFY IN EACH 12-MONTH PERIOD

1001.35

If a seller qualifies as a retailer in one 12-month period, he or she must also qualify in subsequent 12-month periods if the Board is ~~we are~~ to assert the tax on sales made during subsequent periods. When more than two sales are made in any 12 month period, all sales during that period are subject to tax. For example:

An examination of sales of an occasional-unpermitted seller or property not held or used in the course of activities requiring a seller’s permit reveals sales as follows:

a) January 3, 199 6 80	<u>Non Taxable</u> NT
b) August 16, 199 6 80	<u>Non Taxable</u> NT
c) September 8, 199 7 84	<u>Taxable</u> T
d) March 8, 199 8 82	<u>Taxable</u> T
e) July 17, 199 8 82	<u>Taxable</u> T
f) November 10, 199 8 82	<u>Taxable</u> T
g) August 11, 199 9 83	<u>Non Taxable</u> NT
h) December 12, 199 9 83	<u>Taxable</u> T
i) September 8, 2000 1 984	<u>Taxable</u> T
j) December 9, 2000 1 984	<u>Taxable</u> T

Sales (a) and (b) are **nontaxable** as they were the only ones made between January 3, 199~~6~~80 and September 8, 199~~7~~84.

Sales (c), (d) and (e) are **taxable** as they were made within a 12-month period between September 8, 199~~7~~84 and July 17, 199~~8~~82.

Sale (f) is **taxable** as it was made during the same 12-month period sales (d) and (e) were made.

Sale (g) is **not taxable** as it was the only sale made between November 10, 199~~8~~82 and December 12, 1983~~99~~.

Sales ~~(h), (i) and (h), (i) and (j)~~ are **taxable** as they were made in a 12-month period ending December 9, 2000~~1~~984.

SALES OF RETAILER'S PERSONAL PROPERTY**1001.37**

A sale of personal property not ~~ordinarily sold~~ held or used in the course of activities of a commercial venture by a person holding a seller's permit (or who would hold a seller's permit if the person's activities were conducted in this state) is occasional. (~~See Annotation 395.0040~~)

Examples:

- A restaurant owner also owns a dairy farm. He or she sells the farm along with livestock and farm and dairy equipment.
- A pharmacy owner ~~druggist~~ sells his or her home furnishings, equipment and appliances.

VEHICLES, MOBILEHOMES, COMMERCIAL COACHES, VESSELS AND AIRCRAFT OCCASIONAL SALES**1001.40**

Neither sales nor use tax applies to the sale or use of vehicles required to be registered with the Department of Motor Vehicles, nor to off-highway vehicles subject to identification under Division 16.5 of the Vehicle Code, nor to mobilehomes and commercial coaches required to be registered with the Department of Housing and Community Development, nor to vessels or aircraft, providing:

- a) Such property is included in ~~any~~ transfer of all, or substantially all, the property held or used in the course of ~~a business activities~~ of the ~~person transferor~~ selling the property and ~~where, after the transfer~~ the real or ultimate ownership of the property after the transfer is substantially similar to that which existed before such transfer ~~remains unchanged~~; or
- b) The sale or transfer qualifies for the family exemption provided by Section 6285 ~~of the Sales and Use Tax Law~~. Claimants of this exemption must submit satisfactory evidence of qualifying relationship to the Department of Motor Vehicles.

SALES BY GOING CONCERNS**1002.00****GENERAL****1002.05**

(a) When taxable:-

- All sales of property held or used by a seller engaged in an activity for which a seller's permit is required.
- Sales of property not exempt from tax held or used by a seller engaged in an activity for which a seller's permit is not required by reason of the nature of use, not kind of property or because all sales are sales in interstate or foreign commerce. (See AM 1002.25)

(b) When exempt or not subject to tax:-

- (1) The property was not held or used in an activity for which a seller's permit was required, or
- (2) The sale was not one of a series of sales sufficient in number, scope and character to constitute an activity requiring a seller's permit (A.M. Section 1001.35), or
- (3) The transaction was a transfer of tangible personal property contribution to the capital to a partnership, joint venture, limited liability company or corporation without consideration. (See A.M. Section 1001.10)

SALES OF ASSETS BY CERTAIN PERMITTEES MAY BE OCCASIONAL**1002.10**

Sellers whose business activities include both the sale of taxable tangible personal property and the sale of services or personal property exempted by statute will not be required to pay tax on the sale of property held or used exclusively in that segment of their business which does not require the holding of a seller's permit, unless the sales are of sufficient number, scope and character to qualify them as retailers of the assets sold.

Examples of permittees in this group are:

- (a) A Hotel that furnishes meals, beverages and lodgings sells its hotel beds.
- (b) A Theater that operates with a snack bar sells its theater seats.

Subsequent to 7-1-75 sales of property used exclusively in rendering an exempt service or selling exempt products were subject to tax if the services were rendered or the exempt products were sold by a unitary business which was required to hold a seller's permit because of sales of other taxable products. The California Supreme Court in the Ontario Community Foundation Case invalidated the unitary business concept which was added to Regulation 1595 in 1975. Essentially, the Board is placed in the same position as it was prior to 7-1-75. The decision of the Court is retroactive.

LOCATION OF ASSET SOLD MAY DETERMINE TAXABLE STATUS 1002.15

Where two activities, one requiring a seller's permit, the other not, are carried on at the same premises, the location of the asset sold may best determine its taxable status. For example:

- ~~(a)~~ Sale of a television set by a hotel if located in a guest-room, hotel lobby, writing room, etc., would be occasional. If located in the bar, coffee shop or dining room, activities ~~that~~^{which} require a seller's permit, it would be taxable.
- ~~(b)~~ The sale of a ~~shuffle board or juke box~~^{shuffleboard or jukebox} located in the bowling alley portion of a combination bowling alley and cafe would be occasional; if located in the restaurant, the sale would be taxable.

However, if the assets of the activity not requiring a seller's permit are partially used in support of the activity requiring a seller's permit, the sale of the assets should be treated as a taxable transaction in its entirety without regard to the physical location of the assets. For example:

- ~~(a)~~ Sale of general office equipment used in the management of all portions of a bowling alley.
- ~~(b)~~ The sale of tables and chairs located directly behind the bowling area ~~that~~^{which} are used for bowler viewing and/or eating and drinking.

~~Proration of~~ The selling price of the assets; is not prorated between taxable and nontaxable use. ~~would not be in order or an appropriate concept to entertain in making determinations.~~

SALES OF PROPERTY BY PERSON NOT REQUIRED TO HOLD SELLER'S PERMIT BECAUSE OF ~~USED EXCLUSIVELY IN HANDLING~~ PERSONALTY EXEMPTED BY NATURE OR USE 1002.25

A single retail sale by a person not required to hold a seller's permit because of nature of use or engaged exclusively in the business of selling property exempted by nature of its use rather than its kind or nature of sale, i.e. interstate or foreign commerce, is not an occasional sale.

Example:

- The sale of a forklift used exclusively to load ~~baled hay~~^{feed} for ~~feed for cattle, chickens, or other food animals,~~ is subject to the tax. Animal feed^{Hay}, as such, is not exempt from sales tax, ~~but~~^{Hay feed} sold for ~~food animal~~^{cattle feed} is exempt from the tax.
- Sale of a saw by sawmill not required to hold a seller's permit because all its sales are made exclusively in interstate or foreign commerce.
- However, a sale of property other than hay by a producer of hay may be an occasional sale under Section 6006.5(c).

SALE OF BUILDINGS AND MINERALS 1002.30

The sale of buildings or minerals or the like affixed to land is taxable as a sale of tangible personal property when, pursuant to the contract of sale or agreement of sale, the seller is to sever the buildings or minerals or like from the land. When the purchaser is to sever the building or mineral or like affixed to land pursuant to the contract of sale, the sale is not taxable as a sale of tangible personal property.

(Cont.) 1002.30

For example:

- Earth Company is selling rock and dirt to Pool Company. As required by the sales contract, Earth Company must sever the rock and dirt from its land prior to the sale. This is a taxable sale of personal property since the seller severed the rock and dirt pursuant to the contract of sale. However, if Earth Company allowed Pool Company to sever the rock and dirt from Earth Company's land, the sale is not taxable as a sale of tangible personal property.
- The sale of a building affixed to land owned by the seller is not taxable as a sale of tangible personal property if the purchaser severs the building. However, if the seller severs the building, the sale is a sale of tangible personal property and subject to tax. (See next section for fixtures, machinery or equipment that are affixed to the building being sold.)

See Regulation 1596, "Buildings and Other Property Affixed to Realty," for the application of tax to sales of mobilehomes and timber affixed to realty.

TRANSFERS IN PLACE OF AFFIXED FIXTURES, MACHINERY, EQUIPMENT OR DRAPERIES

1002.35

Auditors must ensure that the fixtures, machinery, or equipment are affixed, actually or constructively, to the real property before using this section's analysis to determine whether tangible personal property is sold. If the fixtures, machinery, or equipment is not attached to the realty, the transaction is a sale of tangible personal property.

Transfer with concurrent sale of land or building to purchaser. (Reg. 1596(a).)

The transfer in place of fixtures, machinery, equipment or draperies affixed to land and/or buildings, together with the transfer of the land and/or buildings to the purchaser of the fixtures, machinery, equipment or draperies, is a sale of tangible personal property if the building and/or land is to be severed from the realty by the seller, but is not a sale of tangible personal property, but instead is a transfer of real property not subject to sales tax, if the building and/or land is not to be severed from the realty at all or is to be severed by the purchaser of the building and/or land with affixed fixtures, machinery, equipment and draperies.

For example:

- Grocery Store A sells the building with the fixtures, machinery and equipment that are affixed to the building to Grocery Store B. Grocery Store A owns the land and building. Grocery Store B will operate the fixtures, machinery and equipment in its current place, and as such, is not contemplating removal of the fixtures. Additionally, Grocery Store A is not contemplating the removal of the fixtures. -Grocery Store A does not sever the building. The sale of the building would not be taxable as a sale of tangible personal property. Additionally, since the contract of sale does not contemplate removal of the fixtures by the seller or purchaser, the sale of the fixtures would not be taxable as a sale of personal property. Note: if the seller did sever the building, the sale of the building and fixtures would be taxable as a sale of tangible personal property since severing the building would be considered contemplating removal of the fixtures.

(Cont.) 1002.35

Transfers without concurrent sale of land or buildings to purchaser. (Reg. 1596(c) 1st sentence.)

Transfers in place of fixtures, machinery, equipment or draperies affixed to land or buildings, without the concurrent sale of the land or buildings to the purchaser of fixtures, machinery, equipment or draperies, is a sale of tangible personal property when removal of the fixtures, machinery, equipment or draperies by either the seller or the purchaser is contemplated by the contract of sale, but is not a sale of tangible personal property when removal of such fixtures, machinery, equipment or draperies is not contemplated by the contract of sale. Transfers in place of fixtures, machinery, equipment or draperies affixed to land or buildings, with the concurrent sale of the land or buildings to a person other than the purchaser of fixtures, machinery, equipment or draperies, is a sale of tangible personal property when removal of the fixtures, machinery, equipment or draperies by either the seller or the purchaser is contemplated by the contract of sale, but is not a sale of tangible personal property when removal of such fixtures, machinery, equipment or draperies is not contemplated by the contract of sale.

For example:

- Grocery Store A sells its fixtures, machinery and equipment that are affixed to the building to Grocery Store B (not including the sale of building or land). Grocery Store A owns the land and building. Grocery Store B will operate the fixtures, machinery and equipment in its current place, and as such, is not contemplating removal of the fixtures. Additionally, Grocery Store A is not contemplating the removal of the fixtures. Therefore, the sale by Grocery Store A of the “in-place” fixtures, machinery, and equipment affixed to a building to Grocery Store B would not be taxable as a sale of tangible personal property since the contract of sale did not contemplate the removal of the fixtures by either party.

Transfers by real property lessee (Reg. 1596(c) 2nd sentence).

The transfer in place of fixtures, machinery, equipment or draperies affixed to land or buildings by a lessee of land or buildings is a sale of tangible personal property, when the lessee of the land or buildings to which the items are affixed has the present right to remove the items, either as trade fixtures under Section 1019 of the Civil Code, or under the express terms of the lease.

In sales by the lessee of the land, an auditor’s first step is to obtain the land or building lease agreement to determine if a right to remove is expressed in the lease contract. Additionally, Civil Code Section 1019 provides a tenant may remove from the demised premises, any time during the continuance of his/her term, anything affixed thereto for purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises.

For example:

- A real property lessee sells “in-place” fixtures, machinery and equipment affixed to land or a building. The real property lease contract provides that the lessee has the present right to remove the fixtures, machinery and equipment. This is a taxable sale of tangible personal property since the lessee has the present right to remove the fixtures.

(Cont. 2) 1002.35**Transfers by third party lessor. (Rev. & Tax. Code § 6016.3, Reg. 1660(d)(7).)**

The transfer in place of fixtures, machinery, equipment or draperies affixed to land or buildings by the lessor of the items, who is not the lessor of the land or buildings to which they are affixed and who has the right to remove them on breach or termination of the lease, is a sale of tangible personal property. If the lessor does not have the right to remove the affixed fixtures, machinery, equipment or draperies on breach or termination of the lease, the transfer of the fixtures,

machinery, equipment or draperies is not a sale of tangible personal property, but is a sale of real property.

SALES IN PLACE OF FIXTURES, MACHINERY OR EQUIPMENT — 1002.27

The sale in place of fixtures, machinery, or equipment affixed to land or buildings, together with the sale of the land or buildings, constitutes a sale of real property not subject to sales tax, unless the building or fixtures are severed from the realty by the seller.

The sale in place of fixtures, machinery, or equipment affixed to land or buildings, without the concurrent sale of the land or buildings, is a sale of tangible personal property when:

- a) ~~Removal of the fixtures, machinery or equipment by either the seller or the purchaser is contemplated by the contract of sale.~~
- b) ~~The fixtures, machinery, or equipment are sold by the lessee of the land or buildings to which the items are affixed to a person other than the owner or lessor of the land or buildings, and the lessee seller has the present right to remove the items, either as trade fixtures under Section 1019 of the Civil Code, or under the express terms of the lease.~~
- c) ~~The fixtures, machinery, or equipment are sold by the lessor of the items, who is not the lessor of the land or buildings to which they are affixed, and who has the right to remove them on breach or termination of the lease. The application of tax under these circumstances remains the same even if the items are sold to the owner of the realty to which they are affixed.~~

Unless the contract of sale contemplates removal of the items by either party, the sale in place of fixtures, machinery, or equipment affixed to land or buildings, without the concurrent sale of the land or buildings, is **not taxable** as a sale of personal property ~~when:~~

- a) ~~The fixtures, machinery, or equipment are sold by the owner or lessor of the land or buildings to which the items are affixed.~~
- b) ~~The fixtures, machinery, or equipment are sold by the lessee of the land or buildings to which the items are affixed to the owner or lessor of the land or buildings.~~

Personal property may become real property if it is affixed, actually or constructively, to real property. In determining whether fixtures, machinery, or equipment are so "affixed" to land or buildings consideration should be given to the following illustrative circumstances:

- (a) ~~Whether the items are firmly attached to buildings, structures, foundations, or the earth by nails, bolts, screws, straps, cable, concrete, or similar means. Example: A swimming pool diving board bolted to concrete stanchions versus a life preserver hung on a special hook on the stanchions.~~
- (b) ~~Whether the items are permanently connected to an extensive wiring or plumbing system. Example: An intercom telephone instrument versus a garden hose.~~
- (c) ~~Whether the item, although not itself immovably fastened to realty, constitutes a component part of fixtures, machinery, or equipment which are affixed to realty. Example: The removable strainer basket in a swimming pool filter and the top grates of a built-in gas range versus a free standing fire place screen.~~

(Cont.) 1002.27

- (d) Whether removal of the items would damage the realty to which they are attached. Example: An exhaust fan connected to a power source with a plug-in cord and resting without physical attachment to the building versus a similar fan which cannot be removed without leaving a hole in the wall. Note the second circumstance would also tend to demonstrate the intent of the annexor to make the item a permanent part of the real property.
- (e) Whether the items are effectively secured to realty by their own size and weight. Example: A 500 barrel free standing storage tank versus a 10 cubic yard trash container.
- (f) Whether the items are adapted to the use and purpose for which the land or buildings are used and thus are "constructively annexed" to the realty. Example: In a sawmill rails are installed in the floor so as to constitute part of the realty. A sawmill carriage is attached to the rails and to a power source. The carriage moves on the rails and carries logs into a stationary saw. Since the saw is integrated into the use of the realty as a sawmill, it is constructively affixed to realty.

When questionable transactions of this nature are disclosed in the course of an audit, each of the factors described above should be carefully investigated and analyzed, and each should be covered adequately in the audit comments.

SALE OF FIXTURES AFTER THE SUBSEQUENT TO DATE OF CLOSE-OUT 1002.340

If a sale of fixtures and equipment is not contemplated at the date of closeout, a subsequent single sale of the fixtures may be treated as an occasional sale. However, the single sale of fixtures and equipment after subsequent to the date of closeout is taxable if **either**:

- (a) 1. The sale occurs within 60 days of the date of close-out and the taxpayer cannot establish that the sale was not contemplated at the time of close-out; or
- (b) 2. The sale takes place after 60 days but within one year of the close-out date, **and**
 - a. A contract of sale existed at the date of close-out, **or**
 - b. A lease with an option to buy exists, **or**
 - c. Arrangements are in existence evidencing a plan to sell the fixtures and equipment in due course.

Unless the taxpayer makes sales that which would otherwise qualify him or her as a retailer, a sale will be considered exempt if it occurs over 12 months after the last prior sale. This is true even though there is a contract of sale or an option in existence at the closeout date.

MANUFACTURERS AND WHOLESALERS

1002.345

A manufacturer, wholesaler, or other person in the business of making sales for resale of tangible personal property of a kind the retail sale of which is subject to taxable, whether or not the property is ever sold at retail or is suitable for sale at retail, is subject liable for tax measured by the gross receipts from any of the person's retail sales of tangible personal property.

TRANSFER OF ASSETS BY OTHERS 1003.00

SALES BY AN EXECUTOR, ADMINISTRATOR, ETC. 1003.05

Tangible personal property sold with the sale of a business is subject to the sales tax even though the business has been operated by an executor, ~~executrix~~, administrator, etc.

SALE BY TRUSTEE IN BANKRUPTCY 1003.10

Sales by a trustee in bankruptcy are subject to the tax if made during the operation of the business of the ~~debtor~~ bankrupt to the same extent as sales by other retailers.

However, any sales pursuant to a court order directing liquidation of assets are not subject to the sales tax (Board of Equalization v. Goggin, 9th Cir. 1957) 245 F.-2d 44, cert. den. (1957) 353 U.S. 961).

SALES BY ASSIGNEES 1003.15

The sales tax does not apply to the transfers of tangible personal property to an assignee for the benefit of creditors. The tax does apply, however, to retail sales made by such assignee if he or she makes sales in liquidation or otherwise, sufficient in number, scope and character to require the holding of a seller's permit.

TRANSFER OF PROPERTY TO A MORTGAGEE (LENDER) 1003.20

Tax does not apply to the transfer of tangible personal property subject to a purchase money ~~the mortgage~~ or security interest from thea purchaser-borrower ~~mortgagor~~ to thea seller-lender ~~mortgagee~~ when the only consideration received by the borrower ~~mortgagor~~ is cancellation of the unpaid balance of the purchase price.

Tax applies to the transfer of tangible personal property subject to a non-money mortgage or security interest from thea borrower ~~mortgagor~~ to a lender ~~mortgagee~~ who was not the seller. The measure of tax is the amount by which the borrower ~~mortgagor~~'s obligation was canceled plus any other consideration.

Tax does not apply to transfers of property as a result pursuant to ~~of~~ the rescission of an original agreement or contract. ~~A rescission results in an abrogation of a contract. The~~ Its purpose of rescission is to terminate further liability under the contract and to restore ~~or attempt to restore~~ the parties to their former position. A rescission results even though payment of damages is required to accomplish this restoration.

A deduction for returned merchandise by the original seller is not available under all of the circumstances described above unless the requirements of Regulation 1655 have been met.

TRANSFER OF PROPERTY OF DEBTORS ~~BANKRUPTS~~, DECEDENTS, ETC. 1003.25

Transfers of property by an insolvent seller to an assignee, receiver, or trustee in bankruptcy are not subject to the tax because there is no consideration for the transfer.

(Cont.) 1003.25

Transfers of property to administrators, executors, etc., of a decedent's estate by reason of death are not subject to the tax nor are the subsequent distributions of the property by such administrators, executors, etc., to the beneficiaries of the deceased. There is no consideration for these transfers which occur by operation of law.

TRANSFER OF PROPERTY TO RELATIVES AND OTHERS

1003.30

If a taxpayer makes a gift of assets used in a business for which a seller's permit is required, tax is due only to the extent of the liabilities that have been assumed by the donee; the liabilities assumed may be related to or secured by tangible personal property or other property (e.g., intangible, real, etc.), or unsecured. An example of a proration of the liabilities between taxable and nontaxable property transferred is as follows: (See AM Sections 1004.35 and 1005.10):

Example:

A father gives his business to his son who assumes all business liabilities:

Book value of tangible <u>personal property acquired for use and not resale assets</u>	\$20,000
Book value of total assets	\$50,000
Liabilities assumed by son	\$8,000

Measure of tax:

$$(\$20,000 / \$50,000) \times \$8,000 = \$3,200$$

In the event the father has included inventory valued at \$30,000 in the gift, the taxable ratio of 40% would change to 25% and the measure of tax would be:

$$(\$20,000 / \$80,000) \times \$8,000 = \$2,000$$

An exception to tax due on the liability assumed by the donee occurs when a person who is not in the business of selling vehicles, vessels or aircraft sells such an item to a family member. This exemption is provided in Section 6285. Family members include parents, grandparents, children and spouse.

TRANSFERS OF NONCOMMUNITY PROPERTY BETWEEN HUSBANDS AND WIVES

1003.35

Consideration for ~~such~~ transfers of noncommunity property between a husband and wife, if described in dollars and cents or other measurement of values will be the measure of tax. Where the consideration is intangible, e.g., "in consideration of love and affection~~devotion~~," etc., the transfer will be considered a gift pursuant to the provisions of Audit Manual Section 1003.30.

SINGLE SALE BY OUT-OF-STATE RETAILER

1003.40

A single sale in this state of tangible personalty property by an out-of-state retailer will not qualify as an occasional sale unless the sale would have been an occasional sale had the seller's place of business been located in California.

For example:

A lumber; retailer in Oregon hasa used dragline equipment in California that which he or she sells to a California consumer with title passing in this state. The retailer has made a taxable retail sale.

SALE OF A BUSINESS**1004.00****WHEN SUBJECT TO THE TAX****1004.05**

The following types of sales are subject to tax unless they meet one of the criteria described in section 1004.10 or are otherwise exempt.

- (a) The tax applies to that portion of the gross receipts from the sale of an entire business which represents the ~~fair retail value~~ selling price of tangible personal property held or used in an activity for which the seller is required to hold a seller's permit and acquired by the purchaser for use rather than resale.
- (b) Same as in (a) except that the property sold was not used in an activity requiring the seller to hold a seller's permit. However, the sales made were sufficient in number, scope and character as to qualify the seller as a retailer of assets, or the seller was not required to hold a seller's permit because of the nature of use or property sold, or its sales were made exclusively in interstate or foreign commerce.
- (c) Tax applies to any consideration received for the transfer of tangible personal property to partnerships, joint ventures, limited liability companies, or corporations except to the extent that the transfer is of substantially all property without a substantial change in ownership ~~constitutes a contribution of capital.~~ (See A.M. Section 1004.10(a))

~~However, it should be noted that Section 6006.5(b) of the law exempts in its entirety~~ Section 6367 exempts any transfer of all or substantially all of the property held or used in an activity requiring a seller's permit if, after the transfer, the real or ultimate ownership thereof remains substantially similar.

WHEN NOT TAXABLE**1004.10**

- (a) ~~The tax~~ Tax does not apply to transfers of all or substantially all the property held or used in an activity for which a seller's permit is required, (or for vehicles, mobile homes and commercial coaches required to be registered under the Vehicle Code or Health and Safety Code, and vessels and aircraft held or used in the course of the seller's business activities), provided that after the transfer the real or ultimate ownership of the property is substantially unchanged. Stockholders, bondholders, partners, LLC members or other persons holding an interest in the corporation or other entity are regarded as having the "real or ultimate ownership."
- (b) ~~The tax~~ Tax does not apply to transfers of tangible personalty property to partnerships, joint ventures, limited liability companies, or corporations to the extent that the transfers constitute contributions of capital with no consideration received by the transferee. (See A.M. Section 1001.10)
- (c) ~~The tax does not apply when two or more corporations consolidate to form a third corporation and the only consideration received by the stockholders of the consolidating corporations is stock in the newly formed corporation.~~
- (d) ~~(c)~~ Statutory Tax does not apply to statutory mergers in which ~~where~~ the stockholders of the corporation going out of existence receive stock in the existing (surviving) corporation as their sole consideration for the transfer of assets.

(Cont.) 1004.10

~~(e)(d)~~The tax does not apply to the sale of property not held or used by the seller in the course of activities for which the seller is required to hold a seller's permit and ~~occasional sales not in the course of regular business operations and~~ not otherwise taxable solely because of the nature of activities carried on in an entirely separate endeavor ~~totally unrelated business~~. For example, a hospital can have an exempt occasional sale of its assets used in the rendering of medical and nursing services provided the assets were not used in its activities requiring a seller's permit, such as the activities of the pharmacy and cafeteria, (*Ontario Community Foundation, Inc., et al. v. State Board of Equalization* (1984) 35 Cal.3d 811.). The test is whether sales are made in an entirely-real separate endeavor ~~business~~ or in a department or subdivision of a unified enterprise.

The following points should be considered in deciding whether a taxpayer is engaged in an entirely separate endeavor ~~and distinct activities~~.

- ~~(1)~~1) "Each division" has a completely separate set of books, including journal and general ledgers.
- ~~(2)~~2) Each set of books is separately maintained.
- ~~(3)~~3) Separate bank accounts are maintained.
- ~~(4)~~4) Employees are active in only one "division."
- ~~(5)~~5) The "divisions" are housed in separate buildings.
- ~~(6)~~6) Each "division" has its own fixed assets, including automotive and office equipment which is not used interchangeably.

METHOD OF DETERMINING IF OWNERSHIP CHANGES SUBSTANTIALLY

1004.15

The following is the method used ~~in determining if there is more than a 20 percent change in ownership where a partnership transfers all of its assets to a corporation, where are at least two methods of determining the ownership prior to and subsequent to transfer.~~

	Partnership	Corporation	Interests Common Before and After Incorporation
<u>A</u>	<u>40%</u>	<u>33-1/3%</u>	<u>33-1/3%</u>
<u>B</u>	<u>40%</u>	<u>33-1/3%</u>	<u>33-1/3%</u>
<u>C</u>	<u>20%</u>	<u>33-1/3%</u>	<u>20 %</u>
	<u>100%</u>	<u>100 %</u>	<u>86-2/3%</u>

Partner A owns one-third interest in the corporation and owned at least one-third interest in the partnership. The same is true of partner B. Partner C owned 20 percent interest in the partnership and 33-1/3 percent in the corporation. Thus, the interests that are common in the partnership and the corporation are A 33-1/3 percent, B 33-1/3 percent, and C 20 percent; a total of 86-2/3 percent. There is less than 20 percent change in ownership in this example.

(Cont.) 1004.15

This means that the real or ultimate ownership is “substantially similar” to that which existed before the transfer, and therefore, the transfer of tangible personal property would not be a taxable transaction.

~~Wrong Method—Partners A and B each own 6 2/3 percent less interest in the corporation than in the partnership, and partner C owns 13 1/3 percent greater interest in the corporation than in the partnership. The sum of these changes is 26 2/3 percent. Thus there would not be an 80 percent similarity of ownership.~~

~~Right Method—Partner A owns one third interest in the corporation and owned at least one third interest in the partnership. The same is true of partner B. Partner C owned 20 percent interest in the partnership and at least that much (33 1/3 percent actually) in the corporation~~

~~Thus the interests that are common in the partnership and the corporation are A 33 1/3 percent; B 33 1/3 percent and C 20 percent, a total of 86 2/3 percent. If this method of computation is followed, it will be seen that there is less than 20 percent change in ownership.~~

~~Where situations of this kind arise the auditor should use Method No. 2 in determining the change in ownership. The effect of Method 1 is to count each change in ownership twice, while the second method does not.~~

EXAMPLES OF TAXABLE AND NONTAXABLE TRANSFERS

1004.20

Transactions:

- (a) A and B each own 50 percent of partnership AB. ~~Some~~Part of the partnership property assets are transferred by the partnership solely for stock in commencing corporations Y and Z. A and B each own 50 percent of corporation Y and corporation Z.

Answer: Nontaxable. Transfer of property solely for stock in commencing corporation.

- (b) Six months after the formation of the corporations, the partnership sells all of its packaging equipment, which represents less than 80% of the tangible personal property used in the business, for cash.

Answer: Taxable. Sale is by one entity to one or more other entities.

- (c) One year after transaction (b) the partnership sold its remaining assets to corporation Y and Z for cash.

Answer: Nontaxable. A transfer of all the assets of a business - the ultimate ownership remaining unchanged.

Tax Applies as Follows:

- ~~(d) Nontaxable. Transfer of property solely for stock in commencing corporations.~~

- ~~(e) Taxable sale by one entity to one or more other entities.~~

- ~~(f) Nontaxable. A transfer of all the assets of a business - the ultimate ownership remaining unchanged.~~

BULK SALES OF BUSINESSES (SALES PRICE OF TANGIBLE PERSONAL PROPERTY NOT SPECIFIED)

1004.25

In sales of this type, it will be necessary for the auditor to determine the sales price of the tangible personal property transferred. Listed below are the methods the auditor should use to determine the sales price of the property transferred:

- (a) Determine the book value.

In some instances, book value may not represent true value of tangible personal property or other assets transferred. Accelerated depreciation may have been used whereas the straight-line method would have reflected a more accurate value ~~truer sales price~~. Unless otherwise substantiated, it will be presumed that when a sale of a business is made for an amount in excess of the depreciated book value, the parties to the contract bargained to sell and purchase all assets at the pro rata increased value.

- (b) Convert the county tax assessor's appraisal to actual value.

As the percentage of appraisal varies in the several counties of the state, the auditor should, if possible, determine the percentage used by the local assessor.

- (c) Independent appraisal.

- (d) Taxpayer's estimate.

The auditor should, if at all possible, use two or more of the above methods in order to check the results of one method against the other.

BULK SALE OF A BUSINESS - CONDITIONAL SALES CONTRACT

1004.30

In many instances, businesses are sold under a conditional sales contract. This is a method device to secure payment ~~facilitate enforcement~~ of the entire purchase price by retaining title to the assets transferred including intangibles which, of course, could not be repossessed.

When the auditor encounters this situation, he or she should consider the values of inventories and intangibles included in the balance of the conditional sales contract and determine the fair market value of the taxable tangible personalty property transferred. The methods outlined in Audit Manual Section 1004.25 may be of aid in making this determination.

ASSUMPTION OF CONDITIONAL SALES CONTRACT

1004.32

The following example illustrates the proper method of determining the total consideration received from the sale of tangible personal property where the buyer assumes the remaining balance of a conditional sales contract:

A buys an item of tangible personal property, sales price \$3,500, from **B** under a contract whereby title remains in **B** until the sales price is paid (a conditional sales contract). **A** pays \$500 down and agrees to pay the balance of \$3,000 plus \$600 interest at \$100/month. After making six monthly payments, **A** wishes to sell his or her interest in the property to **C**. (It is assumed the transaction is not an occasional sale ~~which is exempt~~.)

B agrees to the transaction, and **C** takes over **A**'s obligation under the contract giving **A** \$100 cash for **A**'s "equity".

(Cont.) 1004.32

The measure of the tax is the amount of cash exchanged (\$100), if any, plus the amount of the obligation from which **A** was relieved. Since **A** could pay off the contract at any time during its term, his or her obligation is the amount of "principal" still owing plus any amount due to **B** for: (1) interest earned to date of payment, and (2) any "prepayment penalty" which would be assessed if the contract were, in fact, to be paid in full.

CONTRIBUTIONS TO CAPITAL OF A PARTNERSHIP OR JOINT VENTURE

1004.35

- (a) The transfer of tangible personal property by an individual, partnership, joint venture, limited liability company, corporation, or other entity solely for a capital interest in a commencing partnership or joint venture, or a transfer by an existing partner for an increased partnership interest is not subject to ~~the sales tax~~. Since there is no measurable value in money of the capital interest at the time of the transfer to the commencing partnership and no consideration received in a subsequent transfer, the transaction is not a sale.

Examples of ~~such~~exempt transfers:

A, who operates a business with \$50,000 assets and no liabilities, forms partnership **AB** with **B**. **A** contributes ~~his~~ \$50,000 assets, and **B** contributes \$50,000 cash.

Partnership **AB** is a going concern. **B**, a partner, and a seller in his ~~own capacity~~or her own capacity, contributes an additional \$10,000 in assets to the partnership thereby increasing his or her percentage of ownership interest in the partnership. No ~~other~~ consideration is received by **B**.

- (b) However, tax applies to the extent ~~of any consideration is received other than an ownership interest~~; i.e., assumption of liabilities, cash, notes, etc. The measure of tax shall be computed using the following formula:

(Selling Price of the Tangible Personal Property Transferred for Use, Not Resale / Selling Price of All Property Transferred) X All Taxable Consideration = Taxable Measure

— Total Assets

Selling Price is presumed to be book value. Goodwill, patents, and other intangibles may be transferred and accounted for in the formula if these assets existed on the books of the transferor prior to their transfer to the commencing partnership. However, the transferor may establish that the selling price was a price other than book value, such as appraised value, for all assets transferred.

All Consideration includes cash, notes, or assumption of indebtedness.

(Cont.) 1004.35

Example:

"A", an individual, transfers to "B", a commencing partnership, the following:

(1)	Equipment and Fixtures.....	\$20,000
	Real Property.....	<u>\$30,000</u>
(2)	Total Assets Transferred.....	<u>\$50,000</u>

A receives from "B", the partnership, as ~~consideration~~ the following a partnership interest and consideration consisting of an assumption of liabilities of \$10,000.

	Interest in "B".....	\$40,000
(3)	Assumption of Liabilities (A's)	<u>\$10,000</u>
	Total Consideration	<u>\$50,000</u>

The measure of tax is computed as follows:

$$\begin{array}{ccc} (1) & (2) & (3) \\ (\$20,000 / \$50,000) \times \$10,000 = \$4,000 \end{array}$$

(c) Other examples of how the tax applies to transfers to partnerships:

- (1) A operates a business with \$50,000 assets, \$10,000 of which are tangible personal property not purchased for resale, and \$25,000 in liabilities. A contributes the assets to the partnership ~~that~~ which in turn assumes the liabilities. A then receives \$12,500 cash from B for one-half interest in the partnership.

Computation of A's taxable measure:

Liabilities assumed.....	\$25,000
Cash received by A.....	\$12,500
Total other consideration.....	\$37,500

$$(\$10,000 / \$50,000) = 20\% \times \$37,500 = \$7,500$$

- (2) A operates a business with \$50,000 assets, \$10,000 of which are fixtures and equipment and the remainder of which is inventory or property other than tangible personal property. A contributes assets to the commencing partnership B for which ~~he or she~~ A receives \$25,000 from B for one-half ~~share~~ interest in the partnership. ~~There is a taxable~~ The measure of tax for the sale by A to the partnership of is \$5,000 ((\\$10,000/\\$50,000) X \$25,000= \$5,000).

TRANSFER OF PROPERTY BY A PARTNERSHIP INTEREST**1004.40**

- (a) The sale by one partner of a partnership interest or the sales by one or more partners of all or a portion of their partnership interest is not subject to the tax unless the transfer causes or results in a dissolution of the partnership. On dissolution, there is a distribution of partnership assets pro rata, and the sale by the withdrawing partner of the partner's interest in tangible personal property distributed to him or her. The partner's sale of the distributed property, if held or used by the partner/seller in the course of activities for which the seller is required to hold a seller's permit or if the sale is one in a series of sales by the partner(s) qualifying him or her (them) as a retailer, is a sale of tangible personal property subject to tax unless otherwise exempt.

Examples:

- (1) Business-Partnership business is operated by A and B. B, who does not hold a seller's permit and has not made a series of sales sufficient in number, scope, and character to require the holding of a seller's permit, sells his or her partnership interest to A who continues as an individual. No taxable sale-made transaction: occasional sale.
- (2) Partnership Bbusiness is operated by A and B, who does not hold a seller's permit and has not made a series of sales sufficient in number, scope, and character to require the holding of a seller's permit,. B sells his or her interest to C, The business continues to operate by partnership AC. No taxable transaction: occasional sale.
- (3) Partnership Bbusiness operated by A and B who holds a sellers permit. B sells his or her interest to C. If the transfer causes a dissolution of the partnership, B's transfer of distributed property to C is subject to tax. If the transfer does not cause a dissolution of the partnership, B's transfer to C is not subject to tax. For a cash consideration of one half the total capital of A and B, C is given one third interest in the partnership and The business continues as a partnership ABC.

The reason for the nontaxability of these transactions is, of course, the fact that examples (1) and (2) are occasional sales, and example (3) is a contribution to a beginning partnership by C and occasional sales by A and by B.

- (b) Distributions of the assets of a partnership to partners upon dissolution are liquidating dividends-distributions and are not subject to the tax.

- (c) Where a partnership distributes some of its assets in the form of a partial liquidation of the business, the tax does not apply, providing an entire segment of the business of the partnership is being liquidated. For example: A partnership operates a lumberyard and a hardware business. A decides to cease operating the lumberyard. If the assets used in the lumberyard are distributed free and clear of any liabilities to the partners in accordance with their interest in the partnership assets, the distribution is not subject to the tax.
- (d) Sales of the assets of a partnership holding a seller's permit are taxable if sold before dissolution. If, however, the partnership is dissolved and all assets are distributed in kind to partners ~~or assignees of partners~~, the distribution of the property would not be subject to the tax. If the partners in turn sold the assets, the sales ~~would be~~ may qualify as occasional sales ~~unless one of a series of taxable sales~~.
- (e) Joint Ventures. ~~A joint venture is similar to a partnership. The main difference between the two entities is that the joint venture is formed for a specific project. Upon dissolution of the joint venture, property transferred to the members will be considered a liquidating dividend distribution and not subject to the tax in the same manner as a dissolution of a partnership.~~
~~Sales of property by the venture to members or other persons are not occasional and are therefore subject to the tax.~~
 Sale of a member's interest in the venture, which dissolves the venture, to the other members or another person will be considered occasional unless the member is he himself is a retailer by virtue of a series of sales or by requirements to hold a seller's permit.
- (f) Tenants in Common. Where a tenant in common transfers his or her interest in tangible personal property, the sale will be considered occasional unless the tenant is a retailer or becomes a retailer by the sale being one of a series of taxable sales.

Examples:

- (1) ~~A~~ sells his one-fourth interest in a grain harvester to ~~B~~.
- (2) ~~X~~, ~~Y~~ and ~~Z~~ Water Districts jointly own trenching equipment. ~~X~~ sells its interest to either ~~Y~~ or ~~Z~~ Water Districts.

~~(g) Limited Partnership. Where the seller of a business, as security for the purchase price enters into an agreement with the purchaser whereby the seller becomes a limited partner in the new operation, a taxable sale has been made.~~

~~(h)~~(g) Provisions of Chapter 3.5 Vehicles, Vessels and Aircraft, may give rise to taxable transactions against the purchaser in a sale of an interest in the business (see (a) (e), and (f) above) although Transfers of vehicles, vessels and aircraft are never occasional sales and transfers of these items may be subject to use tax even though the sale of other assets may be exempt occasional sales.

Tax applies to sales of an interest in an LLC and distributions of liquidating interests in an LLC in the same manner as it applies to sales of partnership interests and liquidating partnership distributions.

TRANSFER OF ASSETS IN PAYMENT OF PARTNERSHIP LOANS 1004.45

Upon dissolution of a partnership, assets transferred from one partner or partners to another partner or partners in payment of loans are not considered liquidating dividends. Any such transfer is subject to the tax unless exempt as an occasional sale.

CORPORATIONS**1005.00****CONTRIBUTIONS TO COMMENCING CORPORATIONS****1005.05**

Contributions of tangible personal property by any individual, partnership, joint stock company, limited liability company (LLC), or corporation to a commencing corporation solely in exchange for stock in the new corporation are not subject to the tax. If the contributor received any consideration for the transfer ~~other than shares of stock (e.g., the corporation assumed liabilities or issued notes or cash to the contributor)~~, the tax will apply to the amount of the other consideration the transfer is subject to tax.

WHERE STOCK AND OTHER CONSIDERATION RECEIVED**FOR ASSETS TRANSFERRED****1005.10**

If a transfer of assets, ~~not exempt under Section 6006.5 (b) of the law~~, is made to a commencing corporation, solely for first issue stock in the commencing corporation, there is no sale since the stock received by the transferor is not regarded as having measurable value at the time of the transfer. Thus, the stock is not considered gross receipts or consideration. ~~If and the transferor receives any consideration such as notes, cash, or the corporation's assumption of liabilities (even where the transferor also remains liable) other than capital stock~~, the measure of tax shall be computed by the following formula:

(Selling Price of the Tangible Personal Property Transferred for Use, Not Resale / Selling Price of All Property Transferred Total Assets) X All Taxable Consideration = Taxable Measure

Selling Price is presumed to be book value of the assets transferred. Goodwill, patents, and other intangibles may be transferred and accounted for in the formula if these assets existed on the books of the transferor prior to their transfer to the commencing corporation. However, the transferor may establish that the selling price was a price other than book value, such as appraised value, for all assets transferred.

All Consideration means cash, notes, or assumption of indebtedness.

Example:

~~A transfers tangible assets valued at equipment with a book value of \$100,000 to B, a commencing corporation, for \$40,000 stock in B. B assumes liabilities of A in the amount of \$60,000. As the assumption of the liabilities by B constitutes other consideration received by A, the tax will be computed as follows:~~

~~$(\$100,000 / \$100,000) \times \$60,000 = \$60,000$ subject to tax.~~

The above example is, of course, a rather simple illustration of the formula. The following example will better illustrate situations that are commonly encountered by the field auditor:

(Cont.) 1005.10

A'S BALANCE SHEET AS OF 12-31-997

Assets		Liabilities	
Cash	\$5,000	Accounts payable	\$148,500
A/C Receivable	13,000	Taxes payable	500
Inventory	<u>245,000</u>	Notes payable (secured by real property)	<u>210,000</u>
Furniture less depr.	5,500	Notes Payable (secured by personal property)	<u>10,000</u>
Motor Vehicle less depr.	6,000	Notes Payable (unsecured)	<u>5,000</u>
Machinery less depr.	49,000	Total Liabilities	\$35,000
Buildings less depr.	15,000		
Land	<u>5,000</u>	Proprietorship	<u>878,500</u>
Total	\$ <u>1243,500</u>	Total	\$ <u>1243,500</u>

A transfers motor vehicles, machinery, inventory, and real estate to B, a commencing corporation, in exchange for stock and consideration of \$6,510,000 cash and ~~\$45,000 stock in B. B assumes and an assumption of all of A's liabilities of \$35,000.~~ The computation of the measure of tax will be as follows:

<u>Assets Transferred *</u>		<u>Consideration Received</u>	
Inventory	\$ 245,000	Cash ³	\$ 6,510,000
Motor Vehicle ¹	6,000	Capital stock	45,000
Machinery ²	49,000	Liabilities assumed ³	38,500
Real estate	<u>20,000</u>		
Total	\$ <u>1090,000</u>	Total	\$ <u>9045,000</u>

1. DMV will assess use tax at time of registration ~~unless exempt.~~
2. Tangible personal property not for resale.
3. ~~Total~~ Other consideration.

*book value ~~considered~~ presumed to reflect ~~fair market value~~ selling price.

Formula:

(Selling Price of the Tangible Personal Property Transferred for Use, Not Resale / Selling Price of All Property Transferred) X All Taxable Consideration = Taxable Measure

(Total Assets

\$4955,000/\$100,000) X (\$10,000+\$35,000) = (54.444%) X \$45,000 = \$24,500
\$24,750 taxable
\$90,000

The measure of tax for the transfer of the motor vehicle is \$2,700, and use tax measured by that amount shall be paid to the DMV. The measure of tax for the other tangible personal property transferred for use by the corporation is \$22,050.

~~Sales of vehicles by corporations other than those licensed or certificated pursuant to the Vehicle Code as a manufacturer, dealer, dismantler, or lessor retailer are exempt from the sales tax. These, if any, should be excluded from the sales price of tangible personalty transferred unless the seller is a manufacturer, dealer, dismantler, or lessor retailer of motor vehicles. The commencing corporation will be required to pay the use tax, unless otherwise exempt, to the Department of Motor Vehicles, acting on behalf of the Board of Equalization, at the time of making application of registration.~~

EXCHANGE OF PROPERTY FOR RETURN OF STOCK

1005.15

Tangible personal Property received by a stockholder in exchange for shares of stock which are then retired is a means of reducing the stated capital. Such transfers are not liquidating dividends and are therefore subject to the tax.

PRO RATA OR LIMITED DISTRIBUTION OF PROPERTY

1005.20

Where all the stockholders of a corporation receive a pro rata share of some of the assets of the corporation for a portion of the shares they hold and the shares relinquished are retired as a means of reducing capital, such distribution is a partial liquidation and is not subject to the tax.

TRANSFERS TO MORE THAN ONE ENTITY

1005.25

The simultaneous transfer of all or substantially all of the assets of a corporation to one or more wholly owned subsidiaries is an exempt occasional sale under Section 6376 as defined in Section 6006.5(b) of the law.

Example:

A corporation operates five service stations. Four new corporations are formed and the assets of each one of the stations are transferred to the new corporation in exchange for stock. After the transfer there would be one parent corporation and four wholly owned subsidiaries each owning and operating one service station.

CONSOLIDATIONS AND MERGERS

1005.30

When a corporation is involved in a ~~consolidation~~, merger or reorganization, sales tax may or may not apply to the transfer of assets, depending on the manner in which the transfer is accomplished.

Sales tax may apply in situations which follow:

- a) Transfers of assets of a constituent corporation pursuant to corporate reorganizations that do not qualify as a statutory mergers pursuant to the California Corporations Code or similar laws of other states.
- b) Transfers of assets of a constituent corporation ~~even though the merger or consolidation is treated as a corporate reorganization under the Internal Revenue Code,~~ regardless of whether or not ~~F~~federal income ~~T~~tax liability is incurred.
- c) ~~De facto mergers. A de facto merger is when one corporation which is eventually dissolved sells its assets to another corporation for stock or other consideration.~~

(Cont.) 1005.30

An example of a de facto merger which results in a taxable sale:

~~"A" Corporation transfers its assets to "B" Corporation for stock in "B" Corporation and/or cash or other securities and such stock, cash, etc., is delivered by "A" Corporation to the shareholders of "A" Corporation as a liquidating dividend. The transfer of "A" Corporation assets is a taxable sale.~~

Sales tax does not apply to:

Transfers of assets ~~of from~~ a ~~disappearing~~ constituent corporation to a surviving ~~or new~~ corporation pursuant to a statutory merger ~~or consolidation~~ as set forth in Sections 1100-1305 of the California Corporations Code or similar laws of this and other states.

Such ~~exempt~~ California statutory mergers ~~or consolidations~~ are evidenced by a merger agreement that carries a filing stamp showing it has been filed with the Secretary of State, ~~if it is accompanied by a as~~ certificated from by the Secretary of State's Office ~~which contains the official seal of the State of California.~~

The certified stamped copy of the merger agreement ~~and the certificated seal~~ issued by the Secretary of State may be accepted as ~~positive~~ proof that the merger agreement conforms to California's statutory requirements.

~~Such agreements may provide for distribution of cash, property, or securities, in lieu of shares, to stockholders of the constituent corporations. But under the provisions of the code, upon such distribution, the liabilities and stated capital of the surviving or new corporation shall not exceed the value of the assets of the surviving or new corporation.~~

NOTE: Whether or not an agreements ~~qualifies~~ as a statutory mergers ~~or consolidations~~ is within the jurisdiction of the Secretary of State and not the Board of Equalization. Section 1103 of the Corporation Code provides for filing the agreement with the Secretary of State. If evidence of such a filing decision is not available to the field auditor, a request to inquire with the Secretary of State may be directed through channels to the Program Planning Manager with correspondence copy sent to the Chief of Fields Operations ~~Principal Tax Auditor.~~

A ~~consolidation or merger~~ not ~~qualifying as an exempt transaction by reason of the transfer not being made pursuant to a statutory merger or consolidation~~ may nevertheless be exempt as an occasional sale. (See A.M. Section 1004.10.)